

**IN THE SUPREME COURT OF INDIA
WRIT PETITION (CIVIL) No. 829 OF 2013**

S.G. VOMBATKERE & ANR.

.... PETITIONERS

VERSUS

UNION OF INDIA & ORS.

.... RESPONDENTS

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International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Thirty-second session (1988)

General comment No. 16: Article 17 (Right to privacy)

1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.

2. In this connection, the Committee wishes to point out that in the reports of States parties to the Covenant the necessary attention is not being given to information concerning the manner in which respect for this right is guaranteed by legislative, administrative or judicial authorities, and in general by the competent organs established in the State. In particular, insufficient attention is paid to the fact that article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. That means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article. At present the reports either say nothing about such legislation or provide insufficient information on the subject.

3. The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

4. The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.

5. Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. The term "home" in English, "manzel" in Arabic, "zhùzhái" in Chinese, "domicile" in French, "zhilische" in Russian and "domicilio" in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation. In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms "family" and "home".

6. The Committee considers that the reports should include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference allowed by the law. It is also indispensable to have information on the authorities which are entitled to exercise control over such interference with strict regard for the law, and to know in what manner and through which organs persons concerned may complain of a violation of the right provided for in article 17 of the Covenant. States should in their reports make clear the extent to which actual practice conforms to the law. State party reports should also contain information on complaints

lodged in respect of arbitrary or unlawful interference, and the number of any findings in that regard, as well as the remedies provided in such cases.

7. As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant. Accordingly, the Committee recommends that States should indicate in their reports the laws and regulations that govern authorized interferences with private life.

8. Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

9. States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.

10. The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

11. Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system.

Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by

teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

379

European Convention on Human Rights





as amended by Protocols Nos. 11
and 14

supplemented by Protocols Nos. 1, 4,
6, 7, 12 and 13

The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose.

The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at www.conventions.coe.int.

Only the English and French versions of the Convention are authentic.

European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex
www.echr.coe.int

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Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

ARTICLE 1**Obligation to respect Human Rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I RIGHTS AND FREEDOMS

ARTICLE 2**Right to life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3**Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4**Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

ARTICLE 5**Right to liberty and security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7**No punishment without law**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8**Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9**Freedom of thought, conscience and religion**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and

in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10**Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11**Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

(2012/C 326/02)

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CHARTER OF FUNDAMENTAL RIGHTS OF THE
EUROPEAN UNION

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE 1

DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
 - (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
 - (c) the prohibition on making the human body and its parts as such a source of financial gain;
 - (d) the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II

FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

ELIZABETH II

c. 42



Human Rights Act 1998

1998 CHAPTER 42

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes. [9th November 1998]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Introduction

1.—(1) In this Act “the Convention rights” means the rights and fundamental freedoms set out in— The Convention Rights.

- (a) Articles 2 to 12 and 14 of the Convention,
 - (b) Articles 1 to 3 of the First Protocol, and
 - (c) Articles 1 and 2 of the Sixth Protocol,
- as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) “protocol” means a protocol to the Convention—

- (a) which the United Kingdom has ratified; or
- (b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

SCHEDULES

Section 1(3).

SCHEDULE 1

THE ARTICLES

PART I

THE CONVENTION

RIGHTS AND FREEDOMS

*Article 2**Right to life*

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

*Article 3**Prohibition of torture*

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

*Article 4**Prohibition of slavery and forced labour*

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

*Article 5**Right to liberty and security*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

*Article 6**Right to a fair trial*

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

SCH. 1

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

*Article 7**No punishment without law*

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

*Article 8**Right to respect for private and family life*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Article 9**Freedom of thought, conscience and religion*

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.



General Assembly

Distr.: General
1 April 2015

Original: English

Human Rights Council

Twenty-eighth session

Agenda item 3

Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Resolution adopted by the Human Rights Council

28/16. The right to privacy in the digital age

The Human Rights Council,

Guided by the purposes and principles of the Charter of the United Nations,

Reaffirming the human rights and fundamental freedoms enshrined in the Universal Declaration of Human Rights and relevant international human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,

Recalling the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Reaffirming the Vienna Declaration and Programme of Action,

Recalling its resolutions 5/1, on institution-building of the Human Rights Council, and 5/2, on the Code of Conduct for Special Procedures Mandate Holders of the Council, of 18 June 2007, and stressing that the mandate holder shall discharge his or her duties in accordance with those resolutions and the annexes thereto,

Recalling also General Assembly resolutions 68/167 of 18 December 2013 and 69/166 of 18 December 2014 on the right to privacy in the digital age, and Human Rights Council decision 25/117 of 27 March 2014 on the panel on the right to privacy in the digital age,

Recalling further its resolutions 20/8 of 5 July 2012 and 26/13 of 26 June 2014 on the promotion, protection and enjoyment of human rights on the Internet,

Welcoming the work of the Office of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age, noting with interest its report



and/or collect personal data and when they require disclosure of personal data from third parties, including private companies,

Recalling that business enterprises have a responsibility to respect human rights as set out in the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,⁶

Deeply concerned at the negative impact that surveillance and/or interception of communications, including extraterritorial surveillance and/or interception of communications, as well as the collection of personal data, in particular when carried out on a mass scale, may have on the exercise and enjoyment of human rights,

Noting with deep concern that, in many countries, persons and organizations engaged in promoting and defending human rights and fundamental freedoms frequently face threats and harassment and suffer insecurity as well as unlawful or arbitrary interference with their right to privacy as a result of their activities,

Noting that, while concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law,

Noting also in that respect that the prevention and suppression of terrorism is a public interest of great importance, while reaffirming that States must ensure that any measures taken to combat terrorism are in compliance with their obligations under international law, in particular international human rights, refugee and humanitarian law,

1. *Reaffirms* the right to privacy, according to which no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, and the right to the protection of the law against such interference, as set out in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights;

2. *Recognizes* the global and open nature of the Internet and the rapid advancement in information and communications technology as a driving force in accelerating progress towards development in its various forms;

3. *Affirms* that the same rights that people have offline must also be protected online, including the right to privacy;

4. *Decides* to appoint, for a period of three years, a special rapporteur on the right to privacy, whose tasks will include:

(a) To gather relevant information, including on international and national frameworks, national practices and experience, to study trends, developments and challenges in relation to the right to privacy and to make recommendations to ensure its promotion and protection, including in connection with the challenges arising from new technologies;

(b) To seek, receive and respond to information, while avoiding duplication, from States, the United Nations and its agencies, programmes and funds, regional human rights mechanisms, national human rights institutions, civil society organizations, the private sector, including business enterprises, and any other relevant stakeholders or parties;

(c) To identify possible obstacles to the promotion and protection of the right to privacy, to identify, exchange and promote principles and best practices at the national, regional and international levels, and to submit proposals and recommendations to the

⁶ A/HRC/17/31, annex.

TUGENDHAT AND
CHRISTIE
THE LAW OF
PRIVACY AND
THE MEDIA

THIRD EDITION

Edited by

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OXFORD
UNIVERSITY PRESS

THE NATURE OF THE PRIVACY INTEREST

N A Moreham

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A. Introduction

- 2.01** It has often been said that privacy is an elusive concept which defies precise definition. It has been used to protect interests as diverse as the right to the confidentiality of one's correspondence to the right to access abortion services or to have one's post-operative transgender identity recognized. Conceptions of what is private also differ from one individual to another—what one person will be happy to post on Facebook, another will regard as an intimate secret.
- 2.02** This chapter will suggest, however, that privacy does have a core Anglo-Commonwealth meaning. There is also much consensus on why it is important: scholars and judges consistently refer to privacy's role in promoting dignity, autonomy, relationships, and well-being. Understanding these two issues—what privacy is and why it is important—is necessary if lawyers are meaningfully to assess the formulation of a legal privacy right, compensate its breach effectively and balance it properly against other competing interests. Drawing on English authorities, foreign decisions and academic thought, this chapter will therefore identify the key components of the privacy interest and explain why they are worthy of protection.

B. The Scope of the Privacy Interest

Before turning to those questions, it is important to note that this book is about 'privacy' and its impact on the media, and not the broader concept of 'private life' protected by Article 8 of the European Convention on Human Rights (ECHR). Although the two concepts overlap to a considerable degree, they are not the same. As the European Commission acknowledged in the early decision of *X v Iceland*:

For numerous Anglo-Saxon and French authors the right to respect for 'private life' is the right to privacy, the right to live, as far as one wishes, protected from publicity... however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.¹

Since this decision, the right to private life has been held by the European Court of Human Rights (ECtHR) to encompass, amongst other things, physical and psychological integrity, autonomy, and identity.² The fact that 'private life' is a significantly broader concept than 'privacy' means that interests which fall within the English conception of privacy will almost certainly be part of an individual's private life. The inverse does not, however, apply. Protection of privacy without more will not cover all of the multifarious interests covered by the ECHR right to private life. Some of those interests, therefore, fall beyond the scope of this work.

B. The Scope of the Privacy Interest

Anglo-Commonwealth conceptions of privacy usually equate privacy with the ability to avoid unwanted observation, exposure, or publicity. They are narrower than the liberty-based constitutional privacy right developed in the United States (which famously extends to interests like the right to access contraceptives and abortion services)³ and the right to respect for private life in the ECHR (which includes, *inter alia*, identity rights and environmental rights such as a right to be free from excessive noise pollution).⁴ In contrast to these broad decisional rights, Anglo-Commonwealth privacy rights are about restricting access to private information and to the physical self.

The equation of privacy with an ability to avoid unwanted observation, exposure, and publicity was articulated as early as 1848 in the seminal case of *Prince Albert v Strange*. In that case, Knight Bruce V-C described the unauthorized publication

¹ *X v Iceland* App no 6825/74, (1976) 5 DR 86, 87.

² See 3.15–3.36.

³ See eg *Roe v Wade* 410 US 113, 93 S Ct 705 (1973) 727 and *Griswold v Connecticut* 381 US 479, 85 S Ct 1678 (1965) 1682.

⁴ See 3.15–3.36.

of etchings which Prince Albert had made for his own and his family's private amusement as:

...an intrusion—an unbecoming and unseemly intrusion...offensive to that inbred sense of propriety natural to every man—if intrusion, indeed, fitfully describes a sordid spying into the privacy of domestic life—into the home (a word hitherto sacred among us).⁵

- 2.06 The same idea was echoed by Lord Mustill 153 years later when he said in *R v Broadcasting Standards Commission, ex p BBC* that:

To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate.⁶

'Space', here, is clearly meant both physically and metaphorically; it is the mental space to 'be oneself' as well as the physical space which makes up the home and other places of retreat.⁷ Intrusion and retreat also feature clearly in Tipping J's definition of privacy in the leading New Zealand decision, *Hosking v Runting*. He says that:

Privacy is potentially a very wide concept; but, for present purposes, it can be described as the right to have people leave you alone if you do not want some aspect of your private life to become public property. Some people seek the limelight; others value being able to shelter from the often intrusive and debilitating stresses of public scrutiny... It is of the essence of the dignity and personal autonomy and well-being of all human beings that some aspects of their lives should be able to remain private if they so wish. Even people whose work, or the public nature of whose activities make them a form of public property, must be able to protect some aspects of their lives from public scrutiny.⁸

Similar ideas of restricting access to one's private sphere, particularly to private information about oneself, can be seen throughout breach of confidence, misuse of private information, and data protection cases in England, Australia, Canada and New Zealand.⁹

- 2.07 This retreat-focused conception of privacy enjoys considerable academic support. It is most commonly expressed by scholars by reference to an individual's ability to restrict access to him or her self by others. For example, Ruth Gavison defines

⁵ *Prince Albert v Strange* (1848) 2 De G & SM 652, 698; 64 ER 293, 313.

⁶ [2001] QB 885 [48].

⁷ The decision itself concerned secret filming of sales assistants inside a Dixons electronics store. The Court of Appeal upheld the Broadcasting Standards Commission's decision that the filming was a breach of privacy.

⁸ *Hosking v Runting* [2005] 1 NZLR 1, CA [238]–[239].

⁹ For further discussion see chs 3, 4, 5, and 7.

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B. The Scope of the Privacy Interest

privacy as 'a limitation of others' access to an individual' which is lost whenever a person finds out about, pays attention to, or gets close enough to a person to touch or observe a person through the normal use of the senses.¹⁰ Ernest van den Haag defines privacy as the exclusive access of a person to a realm of his or her own and says that it entitles a person to exclude others from watching, utilizing, or invading his or her private realm.¹¹ More recently, Kirsty Hughes has argued that 'the right to privacy should be understood as a right to respect for [behavioural] barriers, and that an invasion of privacy occurs when Y (the intruder) breaches a privacy barrier used by X (the privacy-seeker) to prevent Y from accessing X'.¹²

There is also widespread academic agreement that privacy implies choice. Most proponents of the 'access' definition therefore include an element of voluntariness in their definitions. For example, James Rachels, and Eoin Carolan and Hilary Delany, see privacy as a *control* over, respectively, 'access to us and to information about us'¹³ and 'the access which others have to the different dimensions of that individual's privacy'.¹⁴ Others reject the idea that privacy should be equated with control but nonetheless stress the importance of making the privacy definition subjective. For example, Chris Hunt says that privacy refers to an individual's 'claim to be free from unwanted sensorial access' in relation to information and activities which are 'intimate', 'personal' or about which one feels acutely sensitive;¹⁵ Kirsty Hughes says that 'an invasion of privacy occurs when Y (the intruder) breaches a privacy barrier used by X (the privacy-seeker) to prevent Y from accessing X';¹⁶ and this author, Moreham, has argued elsewhere that privacy should be defined as 'freedom from *unwanted* access' or as a state of 'desired "inaccess"'.¹⁷ 2.08

¹⁰ R Gavison, 'Privacy and the Limits of the Law' (1979) 89 Yale LJ 421, 428-33.

¹¹ E van den Haag, 'On Privacy' in J Pennock and J Chapman (eds), *Privacy* (NOMOS Vol XIII, Atherton Press 1971) 149.

¹² K Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75 MLR 806, 810.

¹³ J Rachels, 'Why Privacy is Important' (1975) 4 Phil & Publ Aff 323, 326.

¹⁴ H Delany and E Carolan, *The Right to Privacy: A Doctrinal and Comparative Analysis* (Thomson Round Hall 2008) 25. See also C Fried, 'Privacy' (1968) 77 Yale LJ 475, 482 (defines privacy as 'the control we have over information about ourselves'); and H Gross, 'Privacy and Autonomy' in Pennock and Chapman (n 11) 169 and 'The Concept of Privacy' (1967) 42 NYULR 34, 35-6 (defines privacy as 'control over acquaintance with one's personal affairs by the one enjoying it').

¹⁵ C Hunt, 'Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort' (2011) 37 Queen's LJ 167, 201.

¹⁶ Hughes (n 12) 810.

¹⁷ N A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 LQR 628, 636 (emphasis added). See also M Weinstein, 'The Uses of Privacy in the Good Life' in Pennock and Chapman (n 11) 94 (defines privacy as a condition of *voluntary* limitation of communication to or from certain others with respect to specified information of 'perceived good'); S Benn, 'Privacy, Freedom and Respect for Persons' in Pennock and Chapman (n 11) 3-4 (says that the right to privacy includes a claim 'not to be watched, listened to, or reported upon *without leave*, and not to have public attention focused upon one *uninvited*' (emphasis added)); and H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 663. But compare Gavison (n 10) 427 (she says that in order '[t]o be nonpreemptive, privacy must not depend on choice').

- 2.09 Where access-based definitions have been criticized it is usually because they are insufficiently broad to capture the decisional, liberty-based decisions which the United States courts treat as part of the privacy interest.¹⁸ Thus, American academic, Daniel Solove, criticizes Gavison's access definition as 'too narrow' because it excludes 'invasions into one's private life by harassment and nuisance and the government's involvement in decisions regarding one's body, health, sexual conduct, and family life'.¹⁹ However, Gavison deliberately excluded these things,²⁰ and those seeking to capture a narrower, retreat-based conception of privacy regard this as an advantage. Thus, Chris Hunt argues that because Gavison's access definition 'necessarily excludes "substantive" or "decisional" privacy claims', she avoids the 'over breadth of the "right to be alone" conception, which conflates privacy with liberty'.²¹ Definitions based on unwanted access are, therefore, broad enough to include unwanted surveillance, intrusion into the home, interference with communications and technology, and the revelation of intimate secrets or images (all of which have been treated as part of the privacy interest by Anglo-Commonwealth courts and lawmakers) without also including decisional-autonomy.²²

(1) Informational Privacy

- 2.10 The next question is *what kind of access* will breach a person's privacy? This section will suggest that the answer—that privacy is breached by unwanted access to personal *information* or to the *physical self*—helps us identify the two core components of the privacy interest.

(a) Unwanted dissemination of private information or material about a person

- 2.11 There is almost universal consensus amongst judges, lawmakers, and commentators that the right to privacy includes protection against the dissemination of private information or material. Most legal redress for breach of privacy focuses on this aspect of the privacy interest. The ECtHR recognizes that the collection and storage of information can interfere with the right to respect for private life in Article 8 ECHR;²³ the Data Protection Act 1998 is aimed at 'the regulation of the processing of information relating to individuals, including the obtaining, holding use or disclosure of such information';²⁴ and, as its label suggests, the misuse of private information action identified by the House of Lords in *Campbell v MGN Ltd*

¹⁸ See 2.04.

¹⁹ D Solove, 'Conceptualizing Privacy' (2002) 90 Cal L Rev 1087, 1105.

²⁰ Gavison (n 10) 436–40.

²¹ Hunt (n 15) 190. See also Delany and Carolan (n 14) 7–8. Solove himself declines to adopt the 'right to be let alone' definition seeing it as 'rather broad and vague' (n 19) 1102. He prefers a 'pragmatic' approach drawing on Ludwig Wittgenstein's notion of 'family resemblances' (n 19) 1096–9.

²² It should be stressed again here that this chapter is concerned with a definition of 'privacy' and not of the broader concept of private life in Art 8 ECHR (see 2.03).

²³ See 3.26–3.28.

²⁴ The Data Protection Act 1998, short title. See generally ch 7.

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B. *The Scope of the Privacy Interest*

protects against the disclosure of private information.²⁵ Overseas, United States and New Zealand courts have expressly recognized torts of giving unreasonable publicity to another's private life²⁶ and disclosure of personal information is protected under Article 9 of the French Civil Code and Articles 1 and 2 of the German Basic Law.²⁷ The privacy of communications is also expressly protected in s 14 of the South African Constitution and specific legislation in the Canadian provinces of British Columbia, Saskatchewan, Manitoba, and Newfoundland.²⁸ There is little doubt, then, that courts and lawmakers regard the protection of private information as a core part of the privacy interest.

Almost all commentators agree that unwanted access to personal information is a breach of privacy. Samuel Warren and Louis Brandeis's famous call for recognition of a right to be 'let alone' stressed the individual's need to keep certain personal information from the world at large.²⁹ In his oft-cited definition, Alan Westin also described privacy as 'the claim of individuals, groups, or institutions to determine for themselves, when, how, and to what extent information about them is communicated to others'.³⁰ And Ruth Gavison says 'a loss of privacy occurs as others obtain information about an individual',³¹ noting that this is not a novel claim.³² This judicial and academic consensus reflects societal instincts about the nature of the privacy interest. Most people, it is suggested, would regard the unwanted dissemination of intimate information about their health, sexual activities, fantasies, financial position, home life, and relationships as a breach of privacy. Likewise, most people regard their correspondence—whether it is communicated by post, email, internet, or telephone—as private.

The relevance to the media of legal rules about the dissemination of private information needs hardly to be stated. Any limit on what can be disseminated will affect the media's operation. If the media are unable to publish private material about a person, then its ability to report on him or her will inevitably be affected. A good understanding of when information will and will not be private is, therefore, of vital

²⁵ [2004] UKHL 22, [2004] 2 AC 457.

²⁶ For the US position, see Restatement (Second) of Torts § 652D (1977), adopted and promulgated by the American Law Institute, and 3.44–3.84. For the New Zealand position, see *Hosking* (n 8) and 3.98–3.103.

²⁷ See further 3.152–3.176.

²⁸ See, respectively, 3.132 and 3.119.

²⁹ S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 Harvard L Rev 193.

³⁰ A Westin, *Privacy and Freedom* (Atheneum 1967) 7.

³¹ Gavison (n 10) 428.

³² Gavison (n 10) 429. See also, T Gerety, 'Redefining Privacy' (1977) 12 Harv CR-CLL Rev 233; J Wagner DeCew, 'The Scope of Privacy in Law and Ethics' (1986) 5 L and Phil 145; H Gross, 'The Concept of Privacy' (1967) 42 NYULR 34; R Wacks, *Personal Information: Privacy and the Law* (Clarendon Press 1989) and *Privacy and Media Freedom* (Oxford University Press 2013); W Parent, 'A New Definition of Privacy for the Law' (1983) 12 Phil & Publ Aff 269, 305; D Solove, 'A Taxonomy of Privacy' (2006) 154 U Pa L Rev 447; and Hunt (n 15). But compare R Parker, 'A Definition of Privacy' (1974) 27 Rutgers L Rev 275.

importance both to the media and those seeking protection from their attention. Much of this book is devoted to that issue in both the English and comparative contexts.

(b) *When will information be private?*

- 2.14 The fact that private information should be accorded some protection is unlikely to be disputed either by those developing privacy laws or those, like the media, who are subject to them. Much more difficult is the question of *what* information should be regarded as private. A substantial part of this book looks at how courts and lawmakers have answered that question. It is also useful, however, to consider the issue in more general terms.
- 2.15 **A broad subjective approach** When defining privacy at a theoretical level, many commentators take a broad approach to the concept of private information. For example, consistent with her view that privacy should be a 'neutral' concept, Ruth Gavison argues that privacy is lost whenever a person finds out *any* information about another.³³ For most commentators, however, Gavison's insistence on objectivity makes the definition too wide; they focus instead on the subjective desires of the subject. Thus, Charles Fried suggests that privacy is lost whenever *control* over information about oneself is lost.³⁴ Similarly, Alan Westin describes privacy as 'the claim of individuals, groups, or institutions to determine for themselves, when, how, and to what extent information about them is communicated to others'.³⁵ On these authors' approaches, the subject's own attitudes determine whether information should be regarded as private. Neither attempts to limit the nature of private information to particular types or categories of material.
- 2.16 These broad subjective definitions reflect the fact that attitudes to personal information differ from person to person. While one person will keep medical affairs completely private, others will talk about them to anyone who will listen. Equally, some people will laugh openly about their indebtedness while others would regard the same information as deeply private. This inherent subjectivity makes it difficult to identify characteristics which all private information has in common.³⁶ Broad subjective definitions avoid this problem by eschewing the attempt.
- 2.17 Although it might accurately describe the theoretical privacy interest, this broad subjective approach does have its limitations. First, these definitions do not tell us, even on a theoretical level, how to determine what an individual's subjective desires are. As Kirsty Hughes says, in order to take the privacy analysis further, 'we

³³ Gavison (n 10) 425–8.

³⁴ Fried (n 14) 482–3.

³⁵ Westin (n 30) 7. See also, Moreham (n 17) 636–9 where this author argues that the definition of privacy must include desire as an element.

³⁶ See further, Moreham (n 17) 641–2.

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B. The Scope of the Privacy Interest

need to know how a desire for privacy is manifested'.³⁷ Further analysis of people's attitudes and behaviours is required.³⁸ Second, as even their proponents acknowledge, broad subjective definitions cannot, on their own, form the basis of a legal privacy right. An action which enabled the individual to claim breach of privacy simply because he or she did not want the information disclosed would obviously be intolerably broad.³⁹ Some kind of objective check or other limitation mechanism is therefore necessary.

Reasonable expectation of privacy One way to translate a broad, subjective approach into the legal context is to add an objective check to determine when information should be regarded as private. Courts often do this by introducing a 'reasonable expectation of privacy' test. Thus, for example, the first step in establishing liability for misuse of private information in England is to show that the claimant had a reasonable expectation of privacy in respect of the information in question.⁴⁰ The first requirement of the New Zealand privacy tort is also that the claimant establish '[t]he existence of facts in respect of which there is a reasonable expectation of privacy'.⁴¹ 2.18

The reasonable expectation of privacy test can be seen, at least in part, as shorthand for whether, in a given situation, the protection of privacy is consistent with prevailing social norms.⁴² It has the advantage of being flexible and responsive to change, thereby avoiding the arbitrariness associated with more prescriptive approaches. It also allows courts to consider a broad range of factors when assessing what information is private. These go beyond the nature of the information in question and include steps the claimant took (or failed to take) to keep the information private. Hughes has argued that, if applied appropriately, the reasonable expectation of privacy test allows courts to ask, both whether the scenario was one in which there was or should be an objectively recognized social norm that privacy should be respected and, if not, what steps the claimant took to protect his or her privacy through the use of physical and/or behavioural barriers. A reasonable expectation of privacy can be established on either analysis.⁴³ 2.19

³⁷ Hughes (n 12) 810.

³⁸ Kirsty Hughes argues that individuals use three behavioural mechanisms to obtain or maintain privacy—physical barriers (which include things such as walls, doors, hedges, locks and safes), behavioural barriers (such as verbal or non-verbal cues), and normative rules (Hughes (n 12) 812). Daniel Solove also argues that the 'limited-access conceptions do not tell us the substantive matters for which access would implicate privacy' (Solove (n 19) 1104) and Chris Hunt argues that the 'desired inaccess' definition includes situations where inaccess is desired for some reason other than privacy (Hunt (n 15) 195).

³⁹ See eg Gavison (n 10) 440–41; and Moreham (n 17) 643.

⁴⁰ See eg *Campbell* (n 25) [21] and ch 5. This position was reaffirmed by the majority of the Supreme Court *Re JR38's application for Judicial Review* [2015] UKSC 42, [2015] 3 W.L.R. 155.

⁴¹ *Hosking* (n 8) at [117], [249]. See further, 3.98–3.99.

⁴² eg Kirsty Hughes argues that application of the test in the misuse of privacy context is shaped largely around the judicial recognition of social norms (Hughes (n 12) 827–8).

⁴³ Hughes (n 12) 824.

- 2.20 The reasonable expectation of privacy test is not, however, without disadvantages. First, although the test is essentially an appeal to prevailing social attitudes about when privacy *should* be protected, because it refers to a claimant's reasonable expectations, liability can be taken to depend on whether privacy is likely to be respected in a particular situation. This problem is exemplified by the Supreme Court of California's decision in *Schulman v W Productions Ltd.*⁴⁴ In that case, the Court held that a woman did not suffer an actionable breach of privacy when a television crew filmed her being attended by paramedics at the scene of a serious road accident because 'for journalists to attend and record the scenes of accidents and rescues is in no way unusual or unexpected'.⁴⁵ In contrast, she could have an objectively reasonable expectation of privacy inside a rescue helicopter because the Court was 'aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent'.⁴⁶ Whether the claimant had an objectively reasonable expectation of privacy therefore depended on whether the media usually respected an individual's privacy in the situations in question. This means that:

... whether or not there is a breach of privacy is determined by reference to the practices of privacy interferers *themselves*—once an intrusive practice becomes sufficiently widespread to be 'in no way unusual or unexpected' (be it videoing people in ambulances, bugging Narcotics Anonymous meetings, or spying on people in public toilets) then claimants will have no action for breach of privacy if it occurs. It follows that there is a strong argument for shifting the focus of the English privacy action away from the claimant's *expectations* of privacy and on to his or her *desires*.⁴⁷

- 2.21 Secondly, some commentators argue that courts applying the reasonable expectation of privacy test take account of factors which should in fact be considered when privacy rights are balanced against other interests. According to the Court of Appeal in the important decision of *Murray*:

... the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.⁴⁸

⁴⁴ *Schulman v Group W Productions Inc* 955 P 2d 469 (Cal 1998).

⁴⁵ *Schulman* (n 44) 490.

⁴⁶ *Schulman* (n 44) 490.

⁴⁷ Moreham (n 17) 647. Kirsty Hughes agrees that '[t]he role of normative barriers must reach beyond merely a consolidation of the status quo' (Hughes (n 12) 814; see also 828–32). See also D Solove, 'Fourth Amendment Pragmatism' (2010) 51 Boston College L Rev 1511, 1524; and E Barendt, 'A Reasonable Expectation of Privacy: A Coherent or Redundant Concept?' in A Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press) (forthcoming).

⁴⁸ *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 [36].

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Commentators argue, though, that factors such as the purpose of the intrusion, the harm caused,⁴⁹ and attributes such as the claimant's status as a public figure or person who has courted publicity,⁵⁰ should not bear on a court's assessment of whether the information is private. Otherwise, the test can end up requiring a claimant to disprove a defence, 'when the burden should be on the defendant to show that the claim is a spurious one, or that the privacy claim is outweighed by the defendant's interest in freedom of expression'.⁵¹

Third, the reasonable expectation of privacy test does not, on its own, provide a ready-made list of what is and is not private. This, some detractors have suggested, creates uncertainty about its application: the social mores underpinning the test are difficult to identify and subject to change.⁵² This can perhaps be ameliorated over time by the emergence of categories of information which are likely to be treated as private. For example, Eady J noted in *Author of a Blog v Times Newspapers Ltd* that successful cases in the English courts had concerned matters of 'a strictly personal nature concerning, for example, sexual relationships, mental or physical health, financial affairs, or the claimant's family or domestic arrangements'.⁵³ While not determinative, these categories do provide some guidance. But Eric Barendt argues that this reliance on categories of information which is usually private obviates the need for the reasonable expectation of privacy test altogether. He says:

The continued existence of the [reasonable expectation of privacy] test is tolerable, only because it is almost always a ritual incantation; courts decide that information about, say, the claimant's health, or family or sexual relationship, is covered by ECHR, art 8, because it is clearly or obviously private, without seriously considering whether it is information in respect of which he had a reasonable expectation of privacy.⁵⁴

Indeed, Barendt questions whether an objective check on the privacy action is necessary at all, arguing that there is no comparable check in the definition of 'personal data' in the Data Protection Act 1998 nor in the law of defamation or right to freedom of expression.⁵⁵ A better approach, he says, would be to rely on a 'non-triviality' or 'seriousness' test to exclude trivial or frivolous claims and for 'privacy law [to] provide... a broad list of categories of private information'.⁵⁶

Identifying categories of private information An alternative approach to identifying what information is private is, therefore, to identify categories or types of

⁴⁹ See Hughes (n 12) 828.

⁵⁰ Barendt (n 47).

⁵¹ Barendt (n 47).

⁵² See eg Barendt (n 47) and Solove (n 47) 1522-4.

⁵³ *Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB) [9].

⁵⁴ Barendt (n 47).

⁵⁵ Barendt (n 47).

⁵⁶ Barendt (n 47).

information which should be regarded as private. An oft-cited judicial attempt at categorization is Gleeson CJ's observation in the Australian High Court case of *Lenah v Game Meats* that '[c]ertain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private'.⁵⁷ Eady J's list in *Author of a Blog v Times Newspapers Ltd*, just outlined, could also provide a useful starting point.⁵⁸ Eric Barendt argues that the ideal would be for Parliament to determine what types of information should be regarded as private for the purposes of a disclosure of private facts tort, to revise it from time to time, and to draft the list non-exhaustively so that 'there is room for an argument that material not on the list should be protected as private'.⁵⁹

- 2.25 A list-based approach to identifying private information has the advantage of promoting certainty. It might well be easier for an editor, blogger, or media lawyer to determine whether something falls within a particular category of private information—sexual information, information about family life, information about finances, for example—than it is to determine whether the person had a reasonable expectation of privacy. Like the other options, however, it has its drawbacks. The first difficulty lies with working out what categories of private information should be on any list. As argued above, what is private to one person will not necessarily be private to another. As a result, people will not always agree about the types of information which should be regarded as private. For example, s 2 of the Data Protection Act 1998 includes in its list of 'sensitive personal data' (which enjoy special privacy protection under the Act), a person's racial or ethnic origin, political opinions, religious beliefs, membership of a trade union, the commission of a criminal offence or the proceedings for such an offence. None of these matters is included in the lists provided Gleeson CJ in *Lenah* nor by Eady J in *Author of a Blog*.⁶⁰
- 2.26 Even if consensus could be reached on the *types* of information which should be regarded as private, it would still be difficult to work out what information falls within each category. If it is too rigidly applied, a categorical approach can lead to arbitrary results. The fact that one person has a sexually-transmitted infection and that another person has a cold could both be described as medical information. However, where the former is highly intimate private information, the latter is unlikely to be regarded as private at all. A rigid rule which said that 'all medical information is private' would provide insufficient scope to distinguish between these very different pieces of information.⁶¹ Likewise, the fact that a man has a

⁵⁷ *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [42] (cited with approval by Lord Hope in *Campbell* (n 25) [93]–[94]). Baroness Hale also said in *Campbell* that: 'It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential' ([145]).

⁵⁸ See *Author of a Blog* (n 53) [9] and 2.22.

⁵⁹ Barendt (n 47).

⁶⁰ See, respectively, 2.24 and 2.22.

⁶¹ See further, Moreham (n 17) 641–3.

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wife and child, that the child was educated in a particular way, and that he has another secret illegitimate child are all matters of family life. A test which simply says 'family life is private' or even, to add Barendt's limitation, 'non-trivial information about family life is private', does not, obviously provide the analytical tools to differentiate between these different types of information. As a result, there is a risk that relatively unimportant (but not necessarily 'trivial') information will be protected because it happens to fall within a category. Conversely, private information falling outside the categories might not be protected, because it does not.

Finally, an approach which relies too heavily on the categorization of information risks ignoring other factors which have an important bearing on whether information is private. In particular, if courts focus exclusively on the subject matter of the information, they might give insufficient weight to the way in which the information was communicated by the defendant. There is a significant difference, for example, between the disclosure of a photograph and the disclosure of a description. A bluntly-applied list approach would also provide insufficient scope to consider the claimant's own behaviour in respect of the information, in particular the degree to which he or she has sought or failed to seek privacy for the matter in question.⁶² 2.27

A combined approach? None of the three approaches to identifying private information—a broad subjective approach, the reasonable expectation of privacy test, or identifying categories of private information—is without difficulties. The best approach might therefore be to combine elements of all three approaches when identifying private information. These might include the claimant's manifest desires in respect of the information, social mores concerning its protection, the nature of the misuse in question, and the nature of the information. Examination of the type or category of information would form an important, though not necessarily determinative, part of this analysis. The current reasonable expectation of privacy test might well be sufficiently flexible to accommodate these various factors within it. Or it could be that some other test—perhaps one focusing on the claimant's desire for inaccess—would be better. Either way, it is important that all relevant factors are considered when assessing whether information is private. 2.28

(2) Physical Privacy: Protection against Interference with the Physical Self

It is a widely-held view that, as well as private information, a comprehensive privacy right must protect physical privacy. 'Physical privacy' refers to freedom from unwanted access to the physical self, rather than to private information about oneself. It includes, in particular, freedom from unwanted watching, listening, recording, photographing, and filming of one's private activities. Paradigmatic examples of interferences with physical privacy include individuals bugging their tenants; 2.29

⁶² Kirsty Hughes stresses the importance of this factor (Hughes (n 12) 824–8).

spying on people in toilets, showers or changing rooms; or intercepting people's telephone calls.⁶³

(a) *Recognition of the importance of physical privacy*

2.30 There is strong academic support for recognition of the physical aspect of the privacy interest. For example, Ruth Gavison identifies as 'typical' breaches of privacy:

...the collection, storage, and computerization of information; the dissemination of information about individuals; peeping, following, watching, and photographing individuals; intruding or entering 'private' places; eavesdropping, wiretapping, reading of letters; drawing attention to individuals; and forced disclosure of information.⁶⁴

Consistently with this, she divides 'limitation of "access"' (which she says is the essence of the privacy interest) into three components: secrecy, anonymity, and solitude.⁶⁵ Both 'anonymity' (which is lost when someone pays attention to another) and 'solitude' (which is lost when one person obtains physical access to another by becoming sufficiently proximate to a person to be able to perceive him or her with the normal use of the senses),⁶⁶ protect the physical privacy interest. Other commentators also stress the importance of freedom from unwanted observation and encroachment. For example, Ernest van den Haag defines privacy as the exclusive access of a person to a realm of his or her own and says that it entitles a person to exclude others from watching, utilizing, or invading his or her private realm.⁶⁷ Judith Wagner DeCew also says that an individual's privacy is diminished when another gains physical proximity to him or her, for example by observing his or her body, behaviour, or interactions; by entering into a home under false pretences; or 'even by a move from a single-person office to a shared one'.⁶⁸ This author, Moreham, has also argued that there are two types of overlapping but distinct privacy interference: the misuse of private information (informational privacy) and unwanted sensory access (physical privacy):

The principal objection in the informational privacy cases is to the fact that someone is *finding out* something about you against your wishes... The second category—physical privacy—is all about unwanted access to the physical self. The interference in these cases is *sensory*: the intruder interferes with your physical privacy by watching, listening to or otherwise sensing you against your wishes.⁶⁹

⁶³ See eg, respectively, *Amati v City of Woodstock, Illinois* 829 F Supp 998 (ND Ill 1993); *Harkey v Abate* 346 NW 2d 74 (Mich App 1983); *C v Holland* [2012] 3 NZLR 672 (HC); *Benitez v KFC National Management* 714 NE 2d 1002 (Ill App 2 Dist 1999); and *Rhodes v Graham* 37 SW 2d 46 (1931).

⁶⁴ R Gavison, 'Privacy and the Limits of the Law' (1979) 89 Yale LJ 421, 436. See also Daniel Solove's broad taxonomy in 'A Taxonomy of Privacy' (n 32).

⁶⁵ Gavison (n 64) 428.

⁶⁶ Gavison (n 64) 428–33.

⁶⁷ van den Haag (n 11).

⁶⁸ DeCew (n 32) 156.

⁶⁹ N A Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73 CLJ 350, 354. See also N A Moreham, 'Liability for Listening: Why Phone Hacking is an Actionable Breach of Privacy' (2015) 8 JML (forthcoming). Many academics divide the concept along similar lines

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As with informational privacy it seems that these many expressions of support for recognition of physical privacy accord with people's instincts about what privacy is. Most people, it is suggested, would regard being spied on in their bedroom, having their intimate bodily functions observed, their personal telephone conversations recorded, or their house broken into as a breach of privacy irrespective of whether there was any subsequent publication of the material obtained. Indeed, in the Supreme Court of California case of *Schulman v Group W Productions Inc*, Werdeger J held that it is the intrusion tort which 'best captures the common understanding of an "invasion of privacy"' and 'is most clearly seen as an affront to individual dignity'.⁷⁰ Academic, Tom Gerety, agrees. He says, physical intrusion 'brings us to the core of our expectations and intuitions about privacy and hence of our rights to it'.⁷¹

Commentators also argue that because of the importance of physical privacy, a concept of privacy which focused exclusively on the disclosure of private information would fail to protect privacy comprehensively. This is well-illustrated by Robert Parker's hypothetical example of an astronaut in a space capsule having all his bodily functions monitored through electrodes sending information to ground control on Earth. As Parker says, although ground control knows more about the astronaut's bodily functions than he does, we can still imagine the astronaut switching off a television camera monitoring the inside of the capsule so that he can 'have a little privacy' when going to the toilet. But the astronaut does not turn off the camera to restrict ground control's access to information about his bodily functions—they know all there is to know already. Instead, he is seeking physical privacy—he does not want ground control to *see* him using the toilet.⁷²

It follows that an action focused entirely on informational privacy would fail properly to recognize one aspect of the privacy interest. As Raymond Wacks says:

What is essentially in issue in cases of intrusion is the frustration of the legitimate expectations of the individual that he should not be seen or heard in circumstances where he has not consented to or is unaware of such surveillance. The quality of the information thereby obtained, though it will often be of an intimate nature, is not the major objection.⁷³

If privacy is to be protected comprehensively both informational and physical privacy, therefore, need to be protected.

including (in addition to those cited elsewhere in this section) R Mulheron, 'A Potential Framework for Privacy? A Reply to *Hello!*' (2006) 69 MLR 679, 696–701; Hunt (n 15) 201; R Wacks, *Privacy and Media Freedom* (Oxford University Press 2013) ch 6; and Hughes (n 12) 810–1.

⁷⁰ *Schulman* (n 44) 489.

⁷¹ Gerety (n 32) 265.

⁷² Parker (n 32) 281.

⁷³ R Wacks, *Personal Information: Privacy and the Law* (Clarendon Press 1989) 248. See also Wacks (n 69) 120–2; 186–219; and 245–8.

(b) Legal recognition of physical privacy

- 2.34 Although they still enjoy less protection than informational privacy, there is increasingly widespread legal recognition of physical privacy interests. The most significant common law protection is the well-established United States tort of intrusion into solitude or seclusion. It is described in § 652B of the Restatement (Second) of Torts as meaning that:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.⁷⁴

The Restatement explains that liability does not depend on publication of material about the claimant.⁷⁵ Instead, an intrusion can be effected physically (when the defendant forces his or her way into an individual's hotel room or insists over the individual's objection on entering his or her home, for example) or by the use of the senses, either with or without mechanical aids (for example, by using binoculars to look through the upstairs windows of a person's house or tapping telephone wires). Consistently with this, United States courts have upheld claims against defendants who, *inter alia*, bug their tenants;⁷⁶ spy on people in toilets or changing rooms;⁷⁷ or intercept people's telephone calls.⁷⁸

- 2.35 Physical privacy is also being increasingly recognized in Commonwealth courts. For example, in the New Zealand decision of *C v Holland*, a first instance judge declined to strike out a claim against a man who had surreptitiously filmed his female flatmate in the shower, observing that recognition of a tort of intrusion into seclusion was 'entirely compatible with, and a logical adjunct to, the *Hosking* tort of wrongful publication of private facts'.⁷⁹ The tort of intrusion into seclusion has also been recognized by the Ontario Court of Appeal which, in *Jones v Tsige*, awarded damages against a bank clerk who accessed (but did not disseminate) the banking records of her partner's former wife on 174 separate occasions.⁸⁰ Four other Canadian states have broad statutory privacy torts which extend to situations where a defendant looks at, listens to or records others against their wishes.⁸¹

⁷⁴ Restatement (Second) of Torts § 652B (1977).

⁷⁵ Restatement (n 74) § 652B(h).

⁷⁶ See *Amati v City of Woodstock* (n 63).

⁷⁷ See, respectively, *Harkey v Abate* (n 63) and *Benitez v KFC* (n 63).

⁷⁸ *Rhodes v Graham* (n 63).

⁷⁹ *C v Holland* (n 63) at [75]. The case subsequently settled.

⁸⁰ *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241. See also *Leung v Shanks*, 2013 ONSC 4943, 231 ACWS (3d) 540 and 3.122–3.129.

⁸¹ See eg *Malcolm v Fleming*, 2000 Carswell BC 1316 (SC); *LAM v JELI*, 2008 BCSC 1147, 170 ACWS (3d) 674; *Lee v Jacobson* (1992) 87 DLR (4th) 401, 31 ACWS (3d) 329 (BCSC); and *Watts v Klaemt* 2007 BCSC 662, [2007] BCWLD 4106. Discussed further at 3.119–3.120.

C. Privacy-related Interests

This increasing support for recognition of physical privacy interests is consistent with recommendations of various law reform bodies. For example, in 2014 the Australian Law Reform Commission recommended the enactment of a new statutory tort protecting against both the misuse of private information, and intrusion into seclusion 'such as by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs'.⁸² The New South Wales Law Commission has also observed that there are two 'elemental situations' that call for privacy protection in private law: 'those in which the defendant has disclosed private information about the plaintiff ("information privacy"), and those in which the defendant has intruded on the plaintiff's solitude, seclusion or private affairs ("seclusion")'.⁸³ Similar observations have been repeatedly made in England and Wales.⁸⁴ 2.36

Further, although there is still no specific protection of physical privacy in English law, there is increasing recognition of its importance. These developments are discussed in detail in Chapter 10. Any enhancement of physical privacy protections would obviously have a significant impact on the news-gathering activities of the media in England and Wales. Recording people's conversations, photographing or filming them surreptitiously, pursuing them for an interview, or sometimes even obtaining unauthorized access to private spaces, are legitimate investigative reporting techniques. Any developments in this area must therefore be accompanied by defences protecting legitimate news-gathering activities. Again, these issues are discussed in Chapter 10. 2.37

C: Privacy-related Interests

This chapter has so far suggested that the two core components of privacy are informational privacy and physical privacy. The focus of this book will be on English protection of those two interests. There are, however, a number of other 2.38

⁸² Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) para 5.15 and Recommendation 5-1.

⁸³ New South Wales Law Commission, *Invasion of Privacy*, Report No 120 (2009) para 4.3. See Law Commission (NZ), *Invasion of Privacy: Penalties and Remedies—Review of the law of privacy Stage 3* (NZLC R113, 2010).

⁸⁴ eg, the 1970 Justice Report proposed criminal sanctions against the use of electronic surveillance devices and civil liability for 'any substantial and unreasonable infringement of any person's privacy' (Justice (British Section of the International Commission of Jurists), *Privacy and the Law* (Chairmen: M Littman and P Carter-Ruck) (Stevens & Sons Ltd 1970) 41–2; the 1972 Younger Committee recommended criminal sanctions for unlawful surveillance and the creation of a 'new tort of unlawful surveillance by device' (Younger Committee, *Report of the Committee on Privacy* (Cmnd 5012, 1972) (Chairman: K Younger) para 53); and in 1990 the Calcutt Committee recommended criminal sanctions against entering private property for the purpose of obtaining personal information, placing bugging devices on private property, or photographing or recording the voices of a person on private property and injunctive relief against publication of any material so obtained (Calcutt Committee, *Report of the Committee on Privacy and Related Matters* (Cm 1102, 1990) (Chairman: D Calcutt, QC) paras 17.8–17.9).

interests associated with the concept of privacy. For example, Daniel Solove includes in his four-part taxonomy of activities that 'create privacy problems'⁸⁵ invasions (decisional interference and intrusion), information collection (surveillance and interrogation), information processing (aggregation, identification, insecurity, secondary use, and exclusion), and information dissemination (breach of confidence, disclosure, blackmail, appropriation, distortion, exposure, and increased accessibility).⁸⁶ William Prosser's famous taxonomy of the American tort of breach of privacy (which was adopted in the Second Restatement)⁸⁷ also divides privacy into four separate interests: '[p]ublic disclosure of embarrassing private facts about the plaintiff'; '[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs'; '[p]ublicity which places the plaintiff in a false light in the public eye'; and '[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness'.⁸⁸

- 2.39 As has already been argued, the Anglo-Commonwealth concept of privacy is less expansive than understandings of privacy in the United States. So far, tortious and legislative liability in the Anglo-Commonwealth has focused on protection against private information and intrusion into solitude and seclusion.⁸⁹ However, given the impact of Prosser's taxonomy on the development of the common law, the other two aspects of his conception of privacy—false light and misappropriation of name and likeness—will both be briefly considered here and in ensuing chapters.

(1) False Light

- 2.40 The Restatement describes the false light tort in the following terms:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- a. the false light in which the other was placed would be highly offensive to a reasonable person, and
- b. the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed.⁹⁰

Prosser and the Restatement provide numerous examples of the sorts of activity which would be actionable under this tort. They include making use of an honest taxi driver's image to illustrate an article on the practices of dishonest taxi drivers, including an innocent person's photograph in a 'rogues' gallery' of convicted

⁸⁵ D Solove, *Understanding Privacy* (Harvard University Press 2008) 102.

⁸⁶ Solove (n 85) 104. He stresses that inclusion of a particular activity within the taxonomy does not automatically imply that legal redress should follow (Solove (n 85) 102).

⁸⁷ Restatement (n 74) ch 28A. Prosser was a Reporter for the Restatement.

⁸⁸ W Prosser, 'Privacy' (1960) 48 Cal L Rev 383, 389. See also Restatement (n 74) § 652A.

⁸⁹ Although four Canadian states have also recognized a statutory right to privacy which includes using the name or likeness of a person without consent in advertising or promotion (see 3.119–3.120).

⁹⁰ Restatement (n 74) § 652E.

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criminals, falsely attributing an inferior poem to a renowned poet, and 'publicity falsely attributing to the plaintiff some opinion or utterance' such as a fictitious advertising testimonial.⁹¹ According to the Restatement, the tort protects an individual's interest 'in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is'.⁹² Both sources also stress that the defendant's actions need not give rise to liability in defamation although the false light must be something which would be objectionable to an ordinary, reasonable person.⁹³

Although it is the least prominent of the four American torts,⁹⁴ the false light action enjoys some support amongst academic commentators. Daniel Solove includes 'harms of inaccuracy' in his taxonomy of privacy problems. He says that, like disclosure, 'distortion' (which he defines as the 'manipulation of the way a person is perceived and judged by others... [which] involves the victim being inaccurately characterized') involves 'the spreading of information which affects the way society views a person... [that] can result in embarrassment, humiliation, stigma and reputational harm'.⁹⁵ Other commentators agree that the false light tort plays an important role in allowing an individual to 'define himself' in public and to 'exercise a legitimate right to be shown to the public as he is' even when the objectionable statement is not defamatory.⁹⁶ For example John Wigmore stated in 1916 that, 'I am entitled to be judged in public by my actual opinions and utterances. To have false ones ascribed to me is an injury to my feelings of self respect. And that is the injury against which I am entitled to be protected'.⁹⁷ 2.41

Advocates for the tort also maintain that non-defamatory false statements can have a significant adverse impact on people's well-being and self-perception. In particular, they can force individuals to discuss matters which should have remained private. For example, referring to the actual case of an athlete credited with wartime heroics which he did not perform, American commentator Nathan Ray says that the athlete might 'be forced to endure the enmity of his comrades, the embarrassment of having to admit details of his undistinguished service, and self-imposed withdrawal from feelings of guilt or shame'.⁹⁸ 2.42

⁹¹ See Prosser (n 88) 398-9 and Restatement (n 74) § 652E and, for further discussion, 3.73-3.79. The action is said to have made its first appearance in 1816 when it was relied on by Lord Byron to prevent circulation of an inferior poem which was being attributed to him: see Prosser (n 88) 398.

⁹² Restatement (n 74) § 652E.

⁹³ Prosser (n 88) 400; and Restatement (n 74) § 652E(b).

⁹⁴ Discussed at 3.44-3.84.

⁹⁵ Solove (n 85) 160.

⁹⁶ N Ray, 'Let There Be False Light: Resisting the Growing Trend Against an Important Tort' (1999-2000) 84 Minn L Rev 713, 749.

⁹⁷ J Wigmore, 'The Right Against False Attribution of Belief or Utterance' (1916) 4 Kentucky LJ 3, 8.

⁹⁸ Ray (n 96) 749, referring to the case of *Spahn v Julian Messner Inc* 21 NY 2d 124, 233 NE 2d 840 (NY 1967).

- 2.43 It is suggested, however, that most Anglo-Commonwealth lawyers would intuitively regard the interests at stake in the American false light cases as affecting reputation, not privacy. The objection to being included in a 'rogues' gallery', depicted in a photograph of dishonest taxi drivers, or having one's name associated with an inferior artistic work (to use the examples of false light provided by the Restatement) is that it suggests that one is a rogue, dishonest, or an inferior artist. These interests are reputational. Indeed, Prosser himself acknowledged that the interest protected by the false light tort is 'clearly that of reputation, with the same overtones of mental distress as in defamation'.⁹⁹ Raymond Wacks agrees that a person's objection in false light cases is not:

... about the mere fact of unwanted publicity nor about the disclosure of intimate facts, but about the fact that the world has received a misleading impression of him. This is the domain of defamation. And even if the plaintiff's reputation is unimpaired by the publicity he is given, it is difficult to see in what sense his *privacy* has been invaded.¹⁰⁰

- 2.44 Reputation is one of the interests protected by the right to respect for private life in Article 8 ECHR. However, as Wacks's quotation suggests, in the domestic English law, it is protected principally by actions such as defamation, malicious falsehood, and passing off.¹⁰¹ Further, although the action for the disclosure of private information provides some protection against the disclosure of damaging true information and, in some limited circumstances, the disclosure of false facts, English courts have been cautious to preserve the boundaries between privacy and defamation. Thus, in *Terry v Persons Unknown*, Tugendhat J said that since 'the nub' of the application before him was 'a desire to protect what is in substance reputation', the claimant's injunction claim should be determined by reference to the rule in *Bonnard v Perryman* (the stricter defamation standard) even though it was pleaded in breach of confidence and privacy.¹⁰²

- 2.45 Tugendhat J's desire to retain the distinction between privacy and reputation is consistent with Prosser's own concerns about the scope of the false light tort. He said:

There has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both, will very often lie. The privacy cases do go considerably beyond the narrow limits of defamation, and no doubt have succeeded in affording a needed remedy in a good many instances not covered by the other

⁹⁹ Prosser (n 88) 400.

¹⁰⁰ R Wacks, *The Protection of Privacy* (Sweet & Maxwell 1980) 171 (original emphasis). Bruce McKenna also argues that '[p]rotection of a reputation interest is inconsistent with the concept of privacy': B McKenna, 'False Light: Invasion of Privacy?' (1979–80) 15 *Tulsa LJ* 113, 119. Although see 2.83–2.87.

¹⁰¹ eg, an amateur golfer, who was depicted without his knowledge or consent in a newspaper advertisement for a Fry's chocolate bar, successfully sued in defamation arguing that the advertisement implied that he had compromised his reputation and status as an amateur golfer (*Tolley v JS Fry & Sons Ltd* [1931] AC 333).

¹⁰² *Terry v Persons Unknown* [2010] EWHC 119 (QB) [123]. See also ch 8.

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tort. It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?¹⁰³

It is suggested, then, that in spite of recognition of 'reputation' as part of the Article 8 right to private life, 'accuracy harms' do not fall squarely within Anglo-Commonwealth conceptions of privacy. Even if there were judicial sympathy in England and Wales for pro-false light arguments, it seems unlikely that a false light tort would be the vehicle for addressing them. The lines between defamation and privacy can, however, be somewhat blurred. The relationship between the two actions, and between privacy and reputation more generally, is therefore discussed at length in Chapter 8. 2.46

(2) Misappropriation of Name and Likeness

The final tort in William Prosser's four-part taxonomy protects against the misappropriation of name and likeness. The Restatement (Second) of Torts defines it succinctly, saying that '[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy'.¹⁰⁴ The *Corpus Juris Secundum* expands further, explaining that the tort gives an individual 'an exclusive right to control the commercial value and exploitation of his name, picture, likeness or personality and to prevent others from exploiting that value without permission or from unfairly appropriating that value for their commercial benefit'.¹⁰⁵ The classic case, it continues, is one in which a person's name or image is used without consent 'to advertise the defendant's product, or to accompany an article sold, to add lustre to the name of a corporation, or for other business purposes'.¹⁰⁶ 2.47

In the earliest misappropriation cases, the tort was used by claimants who wished to avoid publicity altogether. For example, in *Roberson v Rochester Folding Box Co*¹⁰⁷ 2.48

¹⁰³ Prosser (n 88) 400–401. The Australian Law Commission has also said that it is 'questionable whether... placing a person in a false light... [is] properly characterised' as an invasion of privacy and that attacks upon the reputation are 'better left to the law of defamation': see Australian Law Reform Commission, *For Your Information: Australian privacy law and practice*, Report No 108 (2008) para 74.120. See also Australian Law Reform Commission (n 82) paras 5.67–5.73 and New South Wales Law Commission (n 83) para 4.5.

¹⁰⁴ Restatement (n 74) § 652C.

¹⁰⁵ 'Right of Privacy and Publicity' in *Corpus Juris Secundum* (1994), vol 77, 539 [40].

¹⁰⁶ Prosser (n 88) 402. See in the Canadian context *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591, 157 DLR (4th) 577.

¹⁰⁷ 171 NY 538, 64 NE 442 (NY Ct of Apps 1902).

(in which the misappropriation tort was supported in a powerful dissent), a private citizen objected to her photograph appearing on many thousands of boxes of flour without her consent. Similarly, in *Pavesich v New England Life Insurance Co*¹⁰⁸ (in which the *Roberson* dissent was adopted) the objection was to an insurance advertisement which featured a private individual's photograph and an entirely fabricated quotation in which he purportedly endorsed the defendant's policies.

- 2.49 In both these cases, the claimants' principal objection was to the mental or spiritual upset which the unwanted exposure caused. In *Roberson*, Gray J noted that the defendant's unauthorized use of her image had 'greatly humiliate[d] her, by the scoffs and jeers of persons who have recognised her face upon these advertisements, and her good name has been attacked'.¹⁰⁹ The claimant suffered a 'severe nervous shock' as a result.¹¹⁰ Gray J continued that:

...for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorisedly, use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.¹¹¹

The Court in *Pavesich* similarly stressed human interests at stake in the claim, focusing particularly on the assault on the claimant's liberty which the publication entailed:

The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realisation that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.¹¹²

- 2.50 These non-publicity cases fit comfortably with the access-based Anglo-Commonwealth conception of privacy being advanced in this chapter. The interests at stake in *Roberson* and *Pavesich*—dignity, autonomy, and emotional well-being—are much

¹⁰⁸ 69 LRA 101, 50 SE 68 (SC Ga 1905).

¹⁰⁹ *Roberson* (n 107) 448.

¹¹⁰ *Roberson* (n 107) 448.

¹¹¹ *Roberson* (n 107) 450. These dicta were expressly adopted in *Pavesich* (n 108) 78.

¹¹² *Pavesich* (n 108) 80.

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like those interfered with by a breach of physical or informational privacy (discussed above). As one American commentator has observed:

In a societal context in which unauthorized commercial appropriation of a personality is seen as an invasion, causing shame, discomfort, or irritation, rather than economic loss, it is not unreasonable for such an appropriation to be considered part of the 'privacy' interest.¹¹³

However, in modern times, the typical misappropriation case is unlikely to be brought by an individual objecting to the commercial use of his or her image in any circumstances. Instead, the claimant will probably be a celebrity who is unhappy either with the quality of the publicity in question, the defendant's failure to pay for it, or both.¹¹⁴ In these cases, the misappropriation tort is often seen to be protecting a right to publicity, preventing unjust enrichment through the unauthorized exploitation of an individual's goodwill or the reputation associated with his or her name or likeness, often developed 'through the investment of time, effort and money'.¹¹⁵ In this context, it is more difficult to see the misappropriation tort as protecting a core privacy interest as defined in this chapter. As James Treece says:

When a celebrity has consented to prior advertising uses of his name or photograph in connection with similar products his chances for recovery based on injury to sensibilities should diminish. Such a plaintiff can hardly complain of a substantial encroachment on his right to privacy—a significantly diminishing and injurious subjection to the public gaze. Furthermore, his consent to earlier advertisements precludes an argument that the mere appearance of his personality in an advertisement injures his self-esteem. In reality the injury to sensibilities concept does not normally meaningfully apply when a person routinely permits advertising uses of his name or picture. Any anger or outrage that he might feel hardly flows from the shock of confronting his likeness in an advertisement. Rather, his injury takes the form of diminished income. The harm resides not in the use of his likeness but in the user's failure to pay.¹¹⁶

Prosser agrees that:

It seems sufficiently evident that appropriation is quite a different matter from intrusion, disclosure of private facts, or a false light in the public eye. The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity.¹¹⁷

¹¹³ S Halpern, 'The Right of Publicity: Commercial Exploitation of the Associative Value of Personality' (1986) 39 *Vanderbilt L Rev* 1199, 1205.

¹¹⁴ See D Dobbs, *The Law of Torts* (West Group 2000) 1198 (he says that the cases usually involve 'public figures who do not seek privacy but on the contrary seek out opportunities for public exposure and who wish to use their name, likeness, voice or other aspects of "identity" as a property to be sold').

¹¹⁵ 'Right of Privacy and Publicity' (n 105) [40].

¹¹⁶ J Treece, 'Commercial Exploitation of Names, Likeness, and Personal Histories' (1973) 51 *Texas L. Rev* 637, 641.

¹¹⁷ Prosser (n 88) 406. The Restatement also says that 'although the protection of [the individual's] personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right...'; Restatement (n 74) § 652C. For other similar observations see R Wacks (ed), *Privacy: The International Library of Essays in Law and Legal Theory. Privacy: Volume II* (Dartmouth Publishing 1993) xiii; Dobbs (n 114) 1199; Australian Law Reform Commission (n 103) paras 74.120–74.123 and Australian Law Reform Commission (n 82) paras 5.67–5.73.

- 2.52 English courts have so far declined to recognize a character or image right protecting a celebrity's name or image and seem to have limited enthusiasm for doing so.¹¹⁸ They have, however, acknowledged the commercial value of image and personality rights and are willing, in some circumstances, to use other causes of action such as breach of confidence to protect it.¹¹⁹ Further, even without express recognition of image rights, the misuse of private information action enhances celebrities' ability to control when and in what terms images of them appear in the media.¹²⁰ Incidental image rights can therefore impact on the activities of the media. They are discussed in greater detail at 9.89 *et seq.*

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- 2.53 In 1765, the Court in *Entick v Carrington* held, for the first time, that the search of the claimant's home and private papers was unlawful. The plaintiff objected to the search on the grounds that when the messengers:

...broke open the doors to the rooms, the locks...the boxes, chests, drawers, etc...and read over, pryed into, and examined all the private papers, books, etc of the plaintiff...the secret affairs, etc of the plaintiff became wrongfully discovered and made public...¹²¹

The decision was based on the property rights of the claimant and justified by reference to the theories of John Locke. The claimant's rights were said to flow from the right of property which was, in turn, understood to be a right existing in the state of nature, by reason and scripture alike. Thus, the judgment says:

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole... By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license.¹²²

- 2.54 The rationales for protecting the privacy of a person's home and correspondence have moved on since then. Privacy is now seen to promote numerous interests that

¹¹⁸ See *Douglas v Hello! Ltd* [2007] UKHL 21, [2008] 1 AC 1 [285], [293].

¹¹⁹ Lord Walker suggests in *Douglas* (n 118) [285] that the claimants' 'claims come close to claims to a "character right" protecting a celebrity's name and image'. But compare Lord Hoffmann [124] and Lord Nicholls [253].

¹²⁰ See eg *Murray v Big Pictures* [2008] EWCA Civ 446 and *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB).

¹²¹ *Entick v Carrington* (1765) 19 Howell's State Trials 1029, 2 Wils KB 275.

¹²² *Entick* (n 121). The reasoning corresponds to John Locke's second treatise in *Two Treatises of Government* (first published 1689, Macmillan 1960) 321–2, paras 87–9. It should be noted, however, that this passage does not appear in the Wilson report in the English Reports. In that version, Lord Camden is quoted as saying that, 'our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave' (2 Wils KB 275, 291).

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are regarded as essential for human flourishing in a Western liberal democracy. They include individual dignity and autonomy; the development and maintenance of relationships; the promotion of health and well-being; and protection against the judgment of others. Understanding these reasons for protecting privacy is a vital prerequisite for protecting the interest appropriately: both the formulation of the privacy action and the balancing of privacy against other interests require a sound understanding of the reasons why it is important.

(1) Protection of Dignity

The relationship between privacy and dignity is widely recognized by judges and commentators alike. For example, in *Campbell v MGN Ltd*, Lord Hoffmann observed that human rights law has identified private information 'as something worth protecting as an aspect of human autonomy and dignity'.¹²³ In *Douglas v Hello! Ltd*, Lord Walker said that the law's protection of the confidentiality of individuals' private lives is 'based on the high principle of respect for human autonomy and dignity'.¹²⁴ The ECtHR has also held that, '[t]he very essence of the Convention is respect for human dignity and human freedom'.¹²⁵ 2.55

Commentators also recognize that privacy and dignity are closely related. In their celebrated article on the American law, Warren and Brandeis describe the interests protected by privacy as 'spiritual'¹²⁶ and as closely connected with an individual's 'inviolable personality'.¹²⁷ American academics Jeffrey Reiman and Stanley Benn identify the protection of dignity as the principal reason why privacy is important¹²⁸ and Harry Kalven agrees that privacy is 'deeply linked' to individual dignity and the needs of human existence.¹²⁹ In the doctrinal context, Peter Cane has identified privacy as a 'dignitary tort'¹³⁰ and in his response to William Prosser's fragmentary 2.56

¹²³ [2004] UKHL 22, [2004] 2 AC 457 [50]. See also [51]. Baroness Hale also acknowledged that privacy interferences harm both the 'moral' and 'physical' integrity of the claimant ([157]) and Lord Nicholls said that '[a] proper degree of privacy is essential for the well-being and development of an individual' ([12]).

¹²⁴ *Douglas* (n 118) [275]. See also *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776, [2008] EMLR 4 [70]; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20 [7] and [214]; and, in the New Zealand context, *Hosking v Runting* (n 8) at [239] and *Brooker v Police* [2007] 3 NZLR 91 (SC) at [182] and [252].

¹²⁵ *Pretty v UK* (2002) 35 EHRR 1, para 65; see also para 61.

¹²⁶ S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 Harvard L Rev 193, 197.

¹²⁷ Warren and Brandeis (n 126) 205.

¹²⁸ See S Benn, 'Privacy, Freedom and Respect for Persons' in Pennock and Chapman (n 11) 1–13; and J Reiman, 'Privacy, Intimacy and Personhood' (1976) 6 Phil & Publ Aff 26, 39. See also D Feldman, 'Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 Curr Legal Prob 4, 54–58 (especially 55).

¹²⁹ H Kalven Jr, 'Privacy in Tort Law: Were Warren and Brandeis Wrong?' (1966) 31 L and Contemp Prob 326, 326. See also N A Moreham, 'Why is privacy important? Privacy, Dignity and the Development of the New Zealand Breach of Privacy Tort' in J Finn and S Todd (eds), *Law, Liberty, Legislation* (Lexis Nexis 2008) 231.

¹³⁰ P Cane, *The Anatomy of Tort Law* (Hart 1997) 71–4.

analysis of United States tort law,¹³¹ Edward Bloustein argues that the coherence of privacy lies in the fact that all privacy interferences are 'an affront to dignity':

... just as we may regard [assault, battery, or false imprisonment] as offences 'to the reasonable sense of personal dignity,' as offensive to our concept of individualism and the liberty it entails, so too should we regard privacy as a dignitary tort. Unlike many other torts, the harm caused is not one which may be repaired and the loss suffered is not one which may be made good by an award of damages. The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.¹³²

(a) *Evolution of the concept of dignity*

- 2.57 The concept of 'dignity' referred to in these cases and articles refers to the idea that there is an inherent value in all human beings.¹³³ This concept of dignity is reflected in the Preamble to the Universal Declaration of Human Rights which states that:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...¹³⁴

- 2.58 The use of the word 'dignity' to refer to the relative positions of human and non-human beings can be traced to Pico della Mirandola, who wrote a Latin text in the fifteenth century which came to be known as *On the Dignity of Man*. Pico links the dignity of man with reason and the moral law. In a translation of one of Pico's works, Thomas More identified '[t]he nature and dignity of man' as one of twelve reasons for avoiding wrongdoing.¹³⁵ Blaise Pascal wrote to the same effect:

Thought constitutes the very essence of humanity... So our whole dignity consists in thought... So let us work at thinking well: that is the basis of morality.¹³⁶

- 2.59 The belief that humans enjoyed free will, and had moral duties, was derived in these early times from religious belief. Specifically, the belief was based on the creation narrative in the book of Genesis and the Gospels, which included the command to 'Love thy Neighbour'. By the eighteenth century the idea that such rights existed was held to be 'self-evident', or a matter of intuition, although in 1776 it was still said that men were 'endowed by their Creator' with these rights.¹³⁷

¹³¹ See Prosser (n 88).

¹³² E Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 NYULR 962, 1002-03 (see also 1000-07).

¹³³ Paras 2.57-2.60 were written by Sir Michael Tugendhat for the second edition of this book.

¹³⁴ Adopted and proclaimed by the United Nations General Assembly Res 217A (III) (10 December 1948).

¹³⁵ Sir Thomas More, *The Complete Works of Thomas More* (Yale University Press 1997) vol 1, 109.

¹³⁶ B Pascal, *Pensées: Contradiction de L'Homme, sa Grandeur* (Everyman Library 1956) 97, cited by Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006) 30.

¹³⁷ Declaration of Independence (US 1776).

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In 1785, Immanuel Kant set out a new basis for the derivation of duties. He argued that the scriptural command to love our neighbour cannot of itself create a moral duty; a duty must be deduced by reason and arise from free will.¹³⁸ Kant offered instead a secular basis for moral duties and human rights¹³⁹ and took human dignity (*Würde*) as a given. He said:

...the human being and in general every rational being *exists* as an end in itself, *not merely as a means* to be used by this or that will at its discretion; instead he must in all his actions, whether directed to himself or to other rational beings, always be regarded *at the same time as an end*... [Rational beings], therefore, are not merely subjective ends, the existence of which as an effect of our action has a worth for us, but rather *objective ends*, that is, beings the existence of which is in itself an end, and indeed one such that no other end, to which they would serve *merely* as a means, can be put in its place, since without it nothing of *absolute worth* would be found anywhere.¹⁴⁰

This principle—that one should respect the intrinsic value of all persons and seek, insofar as possible, to further their ends as well as one's own—demands that one should '[a]ct that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means'.¹⁴¹ To use a person simply as a means to one's ends—to make money, to titillate, to entertain—is to fail to accord sufficient respect to that individual's inherent value as a person.

(b) Dignity and privacy: modern theoretical accounts

Many theorists argue that the entitlement to respect which Kant identified—the right to be treated as an 'end' and not simply as a 'means'—underpins the modern privacy interest. For example, Stanley Benn argues that the 'general principle of privacy' is grounded upon a more general 'principle... of respect for persons' which he explains in the following terms:

To *conceive* someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behaviour as his apperception of the world changes, and correcting course as he perceives his errors. It is to understand that his life is for him a kind of enterprise, like one's own... To *respect* someone as a person is to concede that one ought to take account of the way in which his enterprise might be affected by one's own decisions. By the principle of respect for persons, then, I mean the principle that every human being, insofar as he is qualified as a person, is entitled to this minimal degree of consideration.¹⁴²

The objection that a person has been treated as a means to another's ends can be raised in almost any situation where one party interferes with the privacy of

¹³⁸ I Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor tr, Cambridge University Press 1996) 4:399, 4:409.

¹³⁹ However, some commentators who support the idea of human rights regard the idea of human dignity as unclear and controversial: M Ignatieff, *Human Rights as Politics and Ideology* (Princeton University Press 2001) 54; Gearty (n 136) 10: 'neither religion nor reason has the hold that each once had'.

¹⁴⁰ Kant (n 138) 4:399, 4:428 (original emphasis).

¹⁴¹ Kant (n 138) 4:399, 4:429.

¹⁴² Benn (n 128) 8–9. See also Reiman (n 128) 39.

another. This includes the media. A journalist who discloses personal information against another's wishes or intrudes when a person wishes to be left alone is inevitably prioritizing his or her own wishes over the subject's. The journalist might be acting for a high minded reason (like serving the public interest) or a self-interested one (like increasing his or her prestige or revenue) but either way he or she is claiming the right to decide whether and how the information is disclosed. Hyman Gross argues that the subject in these situations is 'humiliated' and 'shamed', not just because of what others learn about him or her, but because someone other than the individual is determining what will be done with what is learnt.¹⁴³

- 2.64 Although dignity is implicated in all privacy intrusions, the claimant's dignitary claims will be stronger if the defendant intrudes upon a particularly intimate aspect of private life, for example by disseminating footage of a person engaged in sexual activity, exercising bodily functions, or suffering severe grief or trauma. A breach of privacy might also be a particular affront to dignity if the defendant is intruding on the claimant to serve his or her own personal ends rather than the public interest. A wide range of factors therefore need to be considered when striking a balance between privacy and other competing interests.

(2) Autonomy

- 2.65 A second reason for protecting privacy, commonly identified by English courts alongside dignity, is the promotion of individual autonomy. As outlined in 2.55, Lord Hoffmann identified the relationship between privacy and dignity and autonomy in *Campbell*,¹⁴⁴ as did Lord Walker in *Douglas v Hello! Ltd*.¹⁴⁵ In *Douglas v Hello! Ltd*, Sedley LJ also referred to privacy as 'a legal principle drawn from the fundamental value of personal autonomy'¹⁴⁶ and, in *Campbell*, Lord Nicholls held that privacy 'lies at the heart of liberty in a modern state'.¹⁴⁷
- 2.66 Autonomy is recognized as a core aspect of the broader right to respect for private life in Article 8 ECHR. According to the ECtHR 'the notion of personal autonomy is an important principle underlying the interpretation of [Convention] guarantees'¹⁴⁸ and confers on individuals 'the ability to conduct one's life in a manner of one's own choosing'.¹⁴⁹

The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life under the

¹⁴³ H Gross, 'Privacy and Autonomy' in Pennock and Chapman (n 11) 177.

¹⁴⁴ *Campbell* (n 123) [50]–[51]. See also *Associated Newspapers* (n 124) [70].

¹⁴⁵ *Douglas* (n 118) [275]. See also Eady J in *Mosley* (n 124) [214].

¹⁴⁶ *Douglas v Hello! Ltd* [2000] EWCA Civ 353, [2001] QB 967 [126].

¹⁴⁷ *Campbell* (n 123) [12].

¹⁴⁸ *Goodwin v UK* (2002) 35 EHRR 18, para 90; and *I v UK* (2003) 36 EHRR 53, para 70. See also *Pretty v UK* (n 125), para 61; and *Van Kück v Germany* (2003) 37 EHRR 51, para 69.

¹⁴⁹ *Pretty* (n 125) para 62.

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Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance.¹⁵⁰

A similar approach has been adopted in domestic Human Rights Act 1998 cases where 'autonomy' has often been equated with self-determination.¹⁵¹ In *R (Pretty) v DPP*, for example, four of their Lordships accepted that 'the guarantee under article 8 prohibits interference with the way in which an individual leads his life'.¹⁵²

English courts have yet to articulate what 'autonomy' means in the narrower context of privacy rights. If, as suggested in Section B 'privacy' in the Anglo-Commonwealth is about the ability to protect a zone of inaccessibility, then it only protects autonomy in some circumstances. More particularly, it protects a right to determine whether and in what circumstances others have access to one's physical body and private affairs. Cobb J uses 'liberty' in this sense in the American misappropriation case of *Pavesich v New England Life Insurance Co*:^{2.67}

Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. One may wish to live a life of toil, where his work is of a nature that keeps him constantly before the public gaze, while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him this liberty.¹⁵³

If one substitutes the word 'liberty' for 'autonomy', this passage seems to articulate the way in which 'privacy' (as opposed to the broader concept of 'private life') promotes autonomy in English legal thinking.

Many commentators argue though that the relationship between privacy and autonomy is not just about respect for individual choice; it also promotes autonomous thought and action. They argue that by allowing individuals to retreat from the observation of others, privacy creates a zone where people can be free from concern about the judgment of others, 'be themselves', and think and act in accordance with their own ideas and principles. The underlying premise of this argument^{2.68}

¹⁵⁰ *Pretty* (n 125) para 65.

¹⁵¹ Lord Hope expressly referred to 'self-determination' in *R (Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800 [100]; and also *R (Purdy) v DPP* [2009] UKHL 45, [2009] 3 WLR 403 [36]. See also *Montgomery v Lanarkshire Health Board (Scotland)* [2015] UKSC 11, [2015] 2 WLR 768 [80].

¹⁵² *R (Pretty)* (n 151) [61] (Lord Steyn). See also [23] (Lord Bingham) and [100] (Lord Hope). See in addition *R (Purdy)* (n 151) and *Wood v Commissioner of the Metropolis* [2009] EWCA Civ 414, [2009] 4 All ER 951 [20] (Laws LJ).

¹⁵³ *Pavesich* (n 108) 70. See also *Hosking* (n 8) at [239] (Tipping J says, '[i]t is of the essence of the dignity and personal autonomy and well-being of all human beings that some aspects of their lives should be able to remain private if they so wish').

is that unwanted observation and/or dissemination of information about a person has an inhibiting effect. This is, in turn, said to mean that people will only feel free to 'be themselves' in a zone from which observers can be legitimately excluded: we 'need a sanctuary or retreat, in which we can drop the mask, desist for a while from projecting on the world the image we want to be accepted as ourselves, an image that may reflect the values of our peers rather than the realities of our natures'.¹⁵⁴ So, if people are denied the opportunity to escape the chilling effect of unwanted observation, they will have little scope for independent thought or action:

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality... Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones.¹⁵⁵

Conversely, privacy allows people to learn to be autonomous by enabling them to express and act on their own principles in a protected environment:

[Although] the man who is truly independent—the autonomous man... has the strength of mind to resist the pressure to believe with the rest, and has the courage to act on his convictions... For the rest of us, the freedom we need is the freedom to be something else—to be ourselves, to do what we think best, in a small, protected sea, where the winds of opinion cannot blow us off course. We cannot learn to be autonomous save by practising independent judgment.¹⁵⁶

- 2.69** As with dignity, the autonomy of the claimant will always be a factor to be weighed against the competing freedom of expression interests of the media and other defendants. Publications which reveal private information about people will inevitably undermine their ability to choose what is revealed about them. As with dignity, however, the more serious and intrusive the privacy interference, the greater will be the interference with the claimant's autonomy.

(3) Freedom of Expression

- 2.70** Discussion of the relationship between privacy and freedom of expression usually focuses on the tension between them. Such tension inevitably arises when one party asserts a privacy right in order to stop another from obtaining or disseminating information about him or her. However, privacy can also facilitate freedom of expression both at an individual and societal level.

¹⁵⁴ Benn (n 128) 24–5. See also Gross (n 143) 173; R Gavison, 'Privacy and the Limits of the Law' (1979) 89 Yale LJ 421, 450. As long ago as 1890, Warren and Brandeis observed, '[t]he intensity and complexity of life, attendant upon advancing civilisation, have rendered necessary some retreat from the world' (Warren and Brandeis (n 126) 196).

¹⁵⁵ Bloustein (n 132) 1003. See also S Jourard, 'Some Psychological Aspects of Privacy' (1966) 31 L and Contemp Prob 307, 308–9.

¹⁵⁶ Benn (n 128) 25–6. See also Gavison (n 154) 450 ('societies should enable all, not only the exceptional, to seek moral autonomy'); A Westin, *Privacy and Freedom* (Atheneum 1970) 34; and P Freund, 'Privacy: One Concept or Many?' in Pennock and Chapman (n 11) 182, 195.

D. Rationales for Privacy Protection

(a) Individual freedom of expression

On an individual level, privacy is said to promote freedom of expression by enabling people to engage in creative individual pursuits free both from distraction and 'the inhibitive effects that arise from close physical proximity with another individual'.¹⁵⁷ Privacy can therefore promote those kinds of activities—writing, painting, drawing, composing, *etc*—which may require some kind of retreat from the world.¹⁵⁸ It also gives people a chance to practise: by 'insulating the individual against ridicule and censure at early stages of grouping and experimentation', privacy allows us to have 'some abortive attempts' before going public with our efforts.¹⁵⁹ Without this, it is claimed, we would 'dare less... and only do what we thought we could do well'.¹⁶⁰ 2.71

Some also argue that privacy enhances individual freedom of expression by providing a space in which people can access reading and visual materials without fear of sanction or disapproval.¹⁶¹ An individual might be more inclined to explore alternative religious ideas, for example, if he or she is able to do so away from the scrutiny of other members of his or her religious community. 2.72

(b) Promoting societal discourse

Privacy is often said to serve the wider societal interest of promoting free and open discourse. The concept of an open democratic society sustained by freedom of expression presupposes independent-minded individuals:¹⁶² 'freedom of expression would lose much of its value if... [people] had nothing unique, creative or controversial to express'.¹⁶³ So if, as many commentators suggest, privacy is necessary for the development of autonomous thinking, it is also a vital aspect of open, democratic society. Privacy is also said to encourage the expression of a diverse range of opinions. This is because individuals who have the chance to test new, radical, or potentially unpopular ideas in a protected environment might, '[a]fter a period of germination... be more willing to declare their unpopular views in public'.¹⁶⁴ 2.73

Facilitating uninhibited communication Privacy also promotes free, uninhibited communication by ensuring that people can use communication channels without interception or observation. This argument is well-illustrated in the United 2.74

¹⁵⁷ Gavison (n 154) 446–7.

¹⁵⁸ Gavison (n 154) 447.

¹⁵⁹ Gavison (n 154) 448.

¹⁶⁰ Gavison (n 154) 448.

¹⁶¹ See *eg* E Barendt, 'Privacy and freedom of speech' in A Kenyon and M Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press 2006).

¹⁶² See *eg* Westin (n 156) 34 and the discussion of autonomy from 2.65–2.69.

¹⁶³ D Craig, *Privacy and Employment Law* (Hart 1999) 25. See also C Hunt, 'Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort' (2011) 37 *Queen's LJ* 167, 216–17.

¹⁶⁴ Gavison (n 154) 450. See also Westin (n 156) 34; and Craig (n 163).

States Supreme Court case of *Bartnicki v Vopper*.¹⁶⁵ The case concerned a radio journalist's broadcast of an intercepted mobile telephone conversation between two union officials. A majority of the Supreme Court held that the officials' privacy concerns were overridden by the public interest in the material. Rehnquist CJ dissented, however, arguing that the journalists' actions in fact undermined freedom of expression. He said that the majority decision 'diminishes, rather than enhances, the purposes of the First Amendment, thereby chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day'.¹⁶⁶ People who fear that their mobile phone conversations or other communications will be intercepted are less likely to use them freely.

- 2.75 The fact that media intrusion can chill individual speech was also recognized by the Californian Court of Appeal in *Miller v National Broadcasting Company*.¹⁶⁷ The California Court of Appeal (Second District) said that permitting news-gatherers to have unauthorized access to private premises (in this case as part of an ambulance 'ride-along') 'might have extraordinarily chilling implications for all of us; instead of a zone of privacy protecting our secluded moments, a climate of fear might surround us instead'.¹⁶⁸ The interrelationship between privacy and freedom of expression has also been acknowledged in the context of prisoners' correspondence. In Convention jurisprudence, the right to communicate with those outside the prison system is protected as part of the right to 'private life' and 'correspondence' in Article 8, even though it also involves freedom of expression interests protected in Article 10.¹⁶⁹ It is widely recognized that failure to protect the privacy of individuals' communications with one another can therefore 'lead overall to a loss of free speech'.¹⁷⁰

- 2.76 Privacy also promotes free and uninhibited communication in the context of particular kinds of relationships. Of particular relevance to the media is the protection afforded to journalists' sources. The free flow of information is greatly enhanced if whistle-blowers and other informants can, in appropriate cases, share information with journalists without fear of exposure.

(4) Intimacy and Relationships

- 2.77 As its relationship with freedom of expression illustrates, privacy is not simply about cutting oneself off from others. Many commentators emphasize privacy's

¹⁶⁵ 532 US 514, 121 S Ct 1753 (2001).

¹⁶⁶ *Bartnicki* (n 165) 1769. See discussion of the case in Barendt (n 161).

¹⁶⁷ 232 Cal Rptr 668, 187 Cal App 3d 1463 (Cal App 2 Dist 1986).

¹⁶⁸ *Miller* (n 167) 1493.

¹⁶⁹ See eg *Klamecki v Poland* (No 2) (2004) 39 EHRR 7, paras 137–40; *Natoli v Italy* (2003) 37 EHRR 49, paras 40–6; *AB v Netherlands* (2003) 37 EHRR 48, paras 81–8; *Petra v Romania* (2001) 33 EHRR 5, paras 36–9; *Giovine v Italy* (2003) 36 EHRR 8, paras 24–6; and *Szuluk v UK* (2010) 50 EHRR 10, para 43.

¹⁷⁰ Barendt (n 161).

D. Rationales for Privacy Protection

importance in protecting intimate and social interaction within delineated social spheres. For example, David Feldman says that privacy:

...express[es] the fact that, in modern Western societies... individuals live their lives in a number of different social spheres, which interlock, and in each of which they have different responsibilities, and have to work with people in relationships of varying degrees of intimacy... Typically, while we mark off each sphere from the others, we individually have relatively little privacy as against people operating in our sphere for the purposes of that sphere.¹⁷¹

Such 'spheres' can involve varying degrees of closeness, ranging from the intimacy of family or sexual relationships to the wider sociability of clubs or religious groups.¹⁷² Within all such groups, however, privacy enables individuals to act as they think appropriate for that context without having to worry about judgment or observation of those outside it. Thus, James Rachels says it enables one to: 2.78

... behave with certain people in the way that is appropriate to the sort of relationship we have with them, without at the same time violating our sense of how it is appropriate to behave with, and in the presence of, others with whom we have a different kind of relationship.¹⁷³

This ability to engage more or less exclusively with chosen intimates is seen by some to be a necessary precondition of intimacy and friendship. Fried argues that intimacy (which he says both friendship and love require, in different degrees) is the sharing of information about one's actions, beliefs, or emotions which one does not share with all. Thus, by conferring the right not to share information, 'privacy creates the moral capital which we spend in friendship and love'.¹⁷⁴ 2.79

Others argue that the ability to share information and experiences exclusively with those with whom one feels particularly comfortable—a freedom which privacy confers—is necessary for the formation and maintenance of relationships. This is because, 'we do not find it as easy to express our feelings for one another spontaneously [and] to produce the same kind of mutually sensitive and responsive relations, in full view of a nonparticipant third party'.¹⁷⁵ Rachels illustrates this by imagining a conversation between two close friends. As he says, if the friends were joined by a casual acquaintance then the character of the group would change and conversation about intimate matters would no longer be appropriate. If the friends could never be alone (because there were always casual acquaintances or strangers intruding) then they would have to either carry 2.80

¹⁷¹ D Feldman, 'Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 *Curr Legal Prob* 4, 51. See also Fried (n 14) 485.

¹⁷² Feldman (n 171) 51.

¹⁷³ J Rachels, 'Why Privacy is Important' (1975) 4 *Phil & Publ Aff* 323, 330–1. See also Hunt (n 163) 213–16.

¹⁷⁴ Fried (n 14) 484.

¹⁷⁵ Benn (n 128) 20. Thomas Nagel makes a similar point about sexual activity: T Nagel, 'Concealment and Exposure' (1998) 30 *Phil & Publ Aff* 3, 19.

on as close friends do, thereby 'violating their sense of how it is appropriate to behave around casual acquaintances or strangers', or avoid doing or saying anything which they thought inappropriate before a third party.¹⁷⁶ This latter course would mean that 'they could no longer behave with one another in the way that friends do and further that, eventually, they would no longer *be* close friends'.¹⁷⁷ The same would be true, says Rachels, of more intimate relationships such as husband and wife. Others have made similar observations in respect of wider social relationships with, for example, acquaintances, extended family members, work mates, and members of the community.¹⁷⁸

- 2.81** The relationship between privacy and relationships is implicitly recognized in the many cases where breach of confidence or misuse of private information actions have been used to protect claimants against disclosure of details of intimate relationships. For example, in *Duchess of Argyll v Duke of Argyll*, Ungood-Thomas J held that the 'confidential nature of the relationship [between spouses] is of its very essence and so obviously and necessarily implicit in it that there is no need for it to be expressed'.¹⁷⁹ Detailed disclosures about sexual or intimate relationships have also been held to breach privacy,¹⁸⁰ as have disclosures about social occasions such as weddings and family outings.¹⁸¹ This is consistent with the ECtHR's view that the Convention right to respect for private life includes 'the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality'¹⁸² and that '[r]espect for private life must... [therefore] comprise to a certain degree the right to establish and develop relationships with other human beings'.¹⁸³

(5) Health and Well-being

- 2.82** As courts have consistently acknowledged, a breach of privacy can cause an individual distress and upset. Such distress is in large part caused by the interference with dignity, autonomy, and relationships discussed above, but preservation of health and well-being can also be seen as an independent reason for privacy interests. Psychologists have established links between unwanted surveillance and ill

¹⁷⁶ Rachels (n 173) 330.

¹⁷⁷ Rachels (n 173) 330 (original emphasis).

¹⁷⁸ See Feldman (n 171); and Freund (n 156) 195–6.

¹⁷⁹ [1967] 1 Ch 302, 322.

¹⁸⁰ See *eg Mosley* (n 124); and *Theakston v Mirror Group Newspapers Ltd* [2002] EWHC 137 (QB) (esp [59] and [60]).

¹⁸¹ See *eg Douglas* (n 118); *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481; and *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB).

¹⁸² *X v Iceland* App no 6825/74 (1976) 5 DR 86, 87 (a decision of the European Commission on Human Rights). See also *Botta v Italy* (1998) 26 EHRR 241, para 32; *Rotaru v Romania* App no 28341/95 (2000) 8 BHRC 449, para 43; *Pretty v UK* (n 125) para 61; and *Peck v UK* (2003) 36 EHRR 719, para 57.

¹⁸³ *Niemietz v Germany* (1992) 16 EHRR 97, para 29.

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health¹⁸⁴ and commentators stress the importance of privacy in facilitating relaxation and emotional release. As Westin says, 'individuals can sustain roles only for reasonable periods of time, and no individual can play indefinitely, without relief, the variety of roles that life demands'; privacy is therefore important because it gives people 'a chance to lay their masks aside for rest'.¹⁸⁵ Privacy is also seen as important for the natural expression of strong or intimate feeling, particularly at times of loss, shock or sorrow.¹⁸⁶

(6) Freedom from Judgment/Discrimination

Private activities which are neither unlawful nor harmful can result in disapproval or sanction from other members of society. Some commentators therefore argue that privacy has an important role to play in shielding people who engage in unpopular activities from unjustified discrimination and/or hostility. As discussed above, freedom from censure can help promote autonomous action¹⁸⁷ but it is also seen to be important for its own sake. As David Feldman says:

People ought to tolerate, if not respect, choices which we make in those circles of life to which they are not privy. Although privacy is sometimes regarded as a poor substitute for toleration, being a protection against being watched over by the intolerant rather than an assertion of the wrongfulness of intolerance, they actually go together inseparably. A right to privacy represents an institutional limit on people's capacity to make one suffer from the intolerance.¹⁸⁸

In other words, as Gavison puts it, 'privacy permits individuals to do what they would not do without it for fear of an unpleasant or hostile reaction from others'.¹⁸⁹ This is said to be particularly important where, although the information would not lower the claimants in the minds of 'right-thinking people', it would engender hostility in a significant minority. The ability to suppress information about one's homosexuality was often used to exemplify this argument in the past.

By conferring this ability to hide things about one's character that others might disapprove of, privacy provides incidental protection for reputation. A man who restrains the media from publishing information about his sado-masochistic sexual activities, for example, will prevent friends, associates and the wider public from taking account of those activities when forming their impression of him.

¹⁸⁴ See eg M Smith et al, *Electronic Performance Monitoring and Job Stress in Telecommunications Jobs* (Department of Industrial Engineering and the Communications Workers of America, University of Wisconsin, Madison 1990).

¹⁸⁵ Westin (n 156) 35.

¹⁸⁶ See Westin (n 156) 35-6; and Nagel (n 175) 19-20. For discussion of the impact of intense media interest at times of grief see N A Moreham and Y Tinsley, 'Grief Journalism, Physical Intrusion, and Loss: The Pike River Coal Mine Disaster' in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press) (forthcoming).

¹⁸⁷ See 2.68-2.69.

¹⁸⁸ Feldman (n 171) 57-8. See also Gross (n 143) 177.

¹⁸⁹ Gavison (n 154) 451.

Regardless of whether privacy protection was intended to protect it, the individual's reputation is thereby preserved; by saying that something is nobody else's business, courts prevent others from considering it when deciding what they think of the person. As Feldman explains:

A person is entitled to protect his or her dignity, including both self respect and the esteem of others, from assault on the basis of activities which are nobody else's business. Saying that certain areas of life, or types of activity, are nobody else's business certainly asserts that other people have no right to know what is going on, but also goes a good deal further. In particular, it asserts that the activity in question should be regarded as being irrelevant to the esteem in which a person is held by those who, in other spheres of life, enter into relationships (whether business or social) with us.¹⁹⁰

Richard Posner puts it less sympathetically: 'privacy as the concealment of discreditable facts about oneself... is a method... of enhancing reputation'.¹⁹¹

- 2.85** The idea that privacy can be used to protect reputation is not without difficulty. As discussed in the context of the false light tort above, Anglo-Commonwealth courts and commentators are cautious about using privacy to protect reputation.¹⁹² Indeed, one of the arguments raised against privacy protection is that it enables individuals to protect reputations that they do not deserve. Posner expresses this argument in strong terms:

Much of the demand for privacy... concerns discreditable information, often information concerning past or present criminal activity or moral conduct at variance with a person's professed moral standards. And often the motive for concealment is... to mislead those with whom he transacts. Other private information that people wish to conceal, while not strictly discreditable, would if revealed correct misapprehensions that the individual is trying to exploit, as when a worker conceals a serious health problem from his employer or a prospective husband conceals his sterility from his fiancée.¹⁹³

- 2.86** It is important to note though that privacy can only be said to protect reputation in situations where the private information in question is in some way discreditable. Reputation is not affected in situations, such as those in *Douglas v Hello! Ltd*,¹⁹⁴ *Murray v Express Newspapers plc*,¹⁹⁵ *Weller v Associated Newspapers Ltd*¹⁹⁶ or *von Hannover v Germany*,¹⁹⁷ where the claimant is not doing anything embarrassing or shameful but simply wants to be left alone.

¹⁹⁰ Feldman (n 171) 57.

¹⁹¹ R Posner, 'Privacy, secrecy, and reputation' (1979) 28 Buffalo L Rev 1, 11.

¹⁹² See 2.43–2.46.

¹⁹³ R Posner, 'The right of privacy' (1978) 12 Georgia L Rev 393, 399. See also Posner (n 191) 11–12.

¹⁹⁴ *Douglas* (n 146) (photographs of the claimants' wedding).

¹⁹⁵ *Murray* (n 181) 446 (photographs of the claimant being wheeled in a pushchair on an Edinburgh street).

¹⁹⁶ *Weller* (n 181) (photographs of a family trip to a café).

¹⁹⁷ (2005) 40 EHRR 1.

D. Rationales for Privacy Protection

Further, even in cases involving discreditable information, the extent to which privacy enables individuals to 'mislead' in the way that Posner describes depends on the operation of the public interest defence. If an individual engages in activity which is unlawful or harmful to others, media defendants will usually be able to show that its disclosure is in the public interest. Courts also recognize that the media are entitled to 'set the record straight' if a celebrity or other public figure has misled the public about his or her private character.¹⁹⁸ As Lord Denning MR said in *Woodward v Hutchins*, '[i]f the image which they fostered was not a true image, it is in the public interest that it should be corrected'.¹⁹⁹ Courts have also recognized that a defendant might be entitled to provide private information to an interested party (such as the spouse of an adulterer) even if the information is not to be disclosed to the public at large.²⁰⁰ There is recognition then that matters in which the public or a person's acquaintances have a legitimate interest should not be held to be none of their business. This goes at least some way towards addressing Posner's concerns. 2.87

¹⁹⁸ *Woodward v Hutchins* [1977] 1 WLR 760. See also *Campbell* (n 123) and *A v B plc* (n 141). However, note *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] QB 663 [41].

¹⁹⁹ *Woodward* (n 198) 764.

²⁰⁰ See eg *SKA v CRH* [2012] EWHC 766 (QB); and *BUQ v HRE* [2012] EWHC 774 (QB).

PRIVACY LAW AND SOCIETY

Third Edition



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Assuming, for the sake of argument, that there really are natural laws, might there be a good reason not to appeal to them directly when deciding cases?

Why didn't Judge Parker turn to natural law in the *Roberson* case? Judge Parker seemed implicitly to adhere to an approach to adjudication often described as "positivism". Positivism most commends strictly applying rules put into place by real-world legal authorities. Positivist judges seek preexisting rules or enactments, rather than natural laws, moral values or attractive public policies. Is positivistic adjudication potentially more democratic than natural law adjudication? Is natural law adjudication potentially more humane?

It is important to stress that Judge Cobb did not limit himself to natural law arguments in making a case for the right to privacy. See Anita L. Allen, *Natural Law, Slavery and the Right to Privacy Tort*, 81 *Fordham L. Rev.* 1180, 1201 ("Judge Cobb defended a natural law foundation for the right to privacy, while also utilizing Roman law, state case law precedent, and constitutional law—multiple sources of positive law offering protection for liberty and due process.")

Philosophers have argued that the law ought to include rights of privacy, whether "created" by legislation or "recognized" through the common law. One compelling argument for privacy rights relies on the ideal of respect for persons rooted in the moral thought of Immanuel Kant (1724–1804). S.I. Benn was one of the first influential proponents of the perspective that the principle of respect for persons is an ethical rationale for privacy protection.

S.I. BENN, PRIVACY, FREEDOM, AND RESPECT FOR PERSONS

Nomos XIII (ed. Pennock and Chapman (1971)) 8–9.

I am suggesting that a general principle of privacy might be grounded on the more general principle of respect for persons. By a person I understand a subject with a consciousness of himself as agent, one who is capable of having projects, and assessing his achievements in relation to them. To conceive someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his apperception of the world changes, and correcting course as he perceives his errors. It is to understand that his life is for him a kind of enterprise like one's own, not merely a succession of more or less fortunate happenings, but a record of achievements and failures; and just as one cannot describe one's own life in these terms without claiming that what happens is important, so to see another's in the same light is to see that for him at least this must be important. * * * To respect someone as a person is to concede that one ought to take account of the way in which his enterprise might be affected by one's decision.

public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

**AMERICAN LAW INSTITUTE RESTATEMENT
(SECOND) OF TORTS**

Invasion of Privacy—Sections 652 A, B, C, D and E.

652A. General Principle

- (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
- (2) The right of privacy is invaded by:
 - (a) unreasonable intrusion upon the seclusion of another, as stated in 652B; or
 - (b) appropriation of the other's name or likeness, as stated in 652C; or
 - (c) unreasonable publicity given to the other's private life, as stated in 652D; or
 - (d) publicity that unreasonably places the other in a false light before the public, as stated in 652E.

NOTE: WHY PRIVACY MATTERS—LIBERAL TRADITIONS

S.I. Benn argued, *supra*, that respect for persons mandates respect for privacy. If he is right, a society potentially satisfies a moral mandate of respect for persons when it creates or recognizes legal privacy rights. Does a society which fails to recognize even one of the four privacy torts fail fully to respect persons? Does "respect for persons" capture all the benefits that a society gets out of privacy?

Philosopher Gary Marx's "top ten" list of reasons that privacy is important cites moral, psychological, social and political benefits. See Gary T. Marx, *Privacy and Technology*, <http://www.garymarx.net>. Marx argued, consistent with Benn, that "The ability to control information is linked to the dignity of the individual, self-respect and the sense of personhood. Self-presentations and back-stage behavior are dependent on such control." But he also argued that "Group boundaries are maintained partly by control over information;" that "Privacy makes possible the American ideal of * * * the fresh start;" and that "Privacy can help provide the solitude and peace necessary to mental health and creativity in a dynamic society."

Moreover, privacy has symbolic value in liberal society, Marx maintained: "There is a broader, all encompassing symbolic meaning of practices that protect privacy. Such practices say something about what a nation stands for and are vital to individualism. By contrast, a thread running through all totalitarian systems from the prison to the authoritarian state is lack of respect for the individual's right to control information about

the self. It has been said that the mark of a civilization can be seen in how it treats its prisoners; it might also be seen in how it treats personal privacy."

The *Pavesich* court, again, the first state supreme court to expressly recognize a right to privacy tort, analogized privacy invasions to slavery—a radical lack of liberty. Is respecting privacy only possible in a society that is broadly speaking "liberal"?

By definition *** 'a liberal is a man who believes in liberty'. In two different ways, liberals accord liberty primacy as a political value. (i) Liberals have typically maintained that humans are naturally in 'a *State of perfect Freedom* to order their Actions . . . as they think fit . . . without asking leave, or depending on the Will of any other Man' (Locke ***). Mill too argued that 'the burden of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition. . . . The *a priori* assumption is in favour of freedom . . . ' ***. Recent liberal thinkers such as Joel Feinberg *** , Stanley Benn *** and John Rawls *** agree. This might be called the *Fundamental Liberal Principle* ***: freedom is normatively basic, and so the onus of justification is on those who would limit freedom, especially through coercive means. It follows from this that political authority and law must be justified, as they limit the liberty of citizens. *** (ii) The *Fundamental Liberal Principle* holds that restrictions on liberty must be justified.

Gerald F. Gaus, Liberalism, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/liberalism/>. If liberals understand privacy as a form or requirement of liberty, what kinds of privacy protections are required of a just liberal state? Are privacy torts essential protections?

NOTE: MASTERING THE DOCTRINE

The remainder of this chapter will introduce each of the four privacy torts, one at a time. It will also provide an opportunity to learn common law confidentiality rules, and how celebrities use the right to publicity to protect their fame and work products. As you read through the cases, take careful note of the doctrinal aspects of the privacy torts. Have the doctrines evolved to reflect new cultural change and new technologies?

First, who has standing to sue for invasion of someone's privacy? Can a family member sue? What about an employer? Can a corporation sue for invasion of its own privacy? What monetary damages and/or equitable remedies are available to privacy plaintiffs?

Second, what elements must plaintiffs prove in order to prevail? Must they prove intent? What is the burden of proof? Must the plaintiff always show a "highly offensive" act and prove it by a preponderance of the evidence?

Third, what are the affirmative defenses and privileges on which a defendant may rely? What kinds of unwanted informational disclosures and publications may be privileged by newsworthiness and the First Amendment?

die, surrogate parenting arrangements, and freedom of sexual orientation were first granted, not by the federal courts applying the federal Constitution, but by state courts interpreting state constitutions.

NOTE: LIMITS ON COERCION

In the U.S., the moral and political case for constitutional privacy protection commonly appeals to ideals of liberty and associated notions of autonomy, moral pluralism, tolerance, state neutrality, and limited government. It goes without saying that a good government—even a liberal democratic government committed to tolerating moral, political and religious diversity—cannot allow everyone to do just as they please. Some choices must be respected, but others need not be. The problem is how to choose which is which.

Is there a category of choices that should be categorically immune from state interference? We might label such a category the “private sphere”—a space for personal liberty that is off-limits to government.

There are at least two ways one might seek to characterize an ideal private sphere. The first way would be to make a “wish list” of choices that should be left to individuals. One might put sex, marriage and having babies on such a list. Anyone who chooses the “wish list” approach will have to face the task of explaining why particular choices, even some that have been traditionally regarded as private, should be left to individuals. Why abortion? Why not taxes? Why heterosexual marriage? Why not polygamous unions? Why religion? Why not secular philosophies? The decision to place an item into a private sphere rather than a public sphere will require justification.

A second way to decide what choices belong in a private sphere would be to defend a general principle for categorizing choices as properly private or properly public. The general principle would become the justification for ascribing specific privacy rights. Philosophers have undertaken to come up with just such a sorting principle, perhaps none more cited or debated than the “harm principle” of liberty for self-regarding choices devised by the 19th century British utilitarian philosopher, John Stuart Mill.

JOHN STUART MILL, ON LIBERTY (1859)

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be

compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. * * *

The objections to government interference, when it is not such as to involve infringement of liberty, may be of three kinds * * *. The first is, when the thing to be done is likely to be better done by individuals than by the government. Speaking generally, there is no one so fit to conduct any business, or to determine how or by whom it shall be conducted, as those who are personally interested in it. This principle condemns the interferences, once so common, of the legislature, or the officers of government, with the ordinary processes of industry * * *. The second objection is [this]. In many cases, though individuals may not do the particular thing so well, on the average, as the officers of government, it is nevertheless desirable that it should be done by them, rather than by the government, as a means to their own mental education—a mode of strengthening their active faculties, exercising their judgment, and giving them a familiar knowledge of the subjects with which they are thus left to deal. * * * The third, and most cogent reason for restricting the interference of government, is the great evil of adding unnecessarily to its power.

NOTE: MILL'S HARM PRINCIPLE AND ITS CRITICS

In his elegantly written essay *On Liberty* (1859), Mill suggested we draw a line between what is properly public and properly private by appeal to a principle of "other-regarding" harms: if a choice is harmless or only harmful to the chooser, it goes into the properly private pile; but if a choice is seriously harmful to others, it goes into the public pile.

More fully, Mill urged that the individual should be let alone by government to make his or her own choices on two conditions: first, on the condition that the individual's choices are self-regarding, meaning that they pertain primarily and essentially to the individual himself or herself; and second, on the condition that the individual's choices do not significantly harm or injure the legitimate interests of others. Self-regarding conduct is conduct that "neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself." Phrased differently, an individual's conduct is self-regarding when it "affects the interests of no persons besides himself, or need not affect them unless they like." Mill believed government should be bound by his famous Harm Principle, even though some citizens are likely to use their freedom to commit acts of immorality and self-injury. As explained by Mill: "No one pretends that actions should be as free as opinions. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself * * * [then] the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost."

Mill argued that each individual is ultimately the best judge of his or her own utility or interest. Consequently, "[t]he strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place." This is because, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else, contended Mill. Was he right about this?

Using these simple arguments, Mill drew a line between appropriately public and private realms. However, Mill's simple solution seems to have been too simple. Is it possible to apply the "harm principle" in a way that avoids intractable disagreements over what is "harmful" and/or "self-regarding"?

The realm of privacy Mill marked by appeal to the harm principle has parameters many in the U.S. would reject. Mill believed government should take a more active role in regulating marriage, childbearing and education, than most Americans think appropriate. In the U.S., marriage, childbearing and childrearing are often regarded as quintessentially private matters. Mill saw the matter differently. He did not consider behavior respecting one's own children "self-regarding" behavior. Mill thought government ought to regulate marriage and childbearing heavily: "[t]he laws which * * * forbid marriage unless the parties can show that they have the means of supporting a family do not exceed the legitimate powers of the State * * * [and] are not objectionable" as violations of liberty. Mill observed that "to bestow a life which may be either a curse or a blessing[,] unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence,

is a crime against that being." In an overpopulated or potentially overpopulated country, "to produce children, beyond a very small number, with the effect of reducing the reward of labor by their competition is a serious offense against all who live by the remuneration of their labor."

Mill was criticized in his own time, and continues to be criticized today. Some reject the individualism of his stance. Others see his view that government should not protect people from harming themselves as excessively libertarian. Still others reject the implication that government cannot ban or punish deeply offensive, but not harmful behavior, such as insults and hate speech aimed at Jews, racial minorities or gay, lesbian and transgender Americans. His strongly anti-paternalistic beliefs led Mill to oppose drug, alcohol and gambling prohibitions aimed at avoiding self-abuse or intemperance. But if the best medical and social science are in agreement that a certain form of conduct is harmful to people, should the community stand by and watch its members destroy themselves? In a related vein, Mill is also criticized for his view that government should not prohibit what a majority believes is immoral conduct. A critic of Mill and defender of what is often termed "legal moralism," James Fitzjames Stephen wrote a book-length attack on Mill, defending the idea that regulation of and by morals is both legitimate and inevitable. The timeless flavor of the Mill-Stephen debate can be gleaned from the excerpts that follow. What did Stephen mean by "privacy," and "morals"? Note Stephen's interesting observation that it can be an invasion of privacy to compel or persuade a person "to direct too much attention to his own feelings and to attach too much importance to their analysis."

**JAMES FITZJAMES STEPHEN, LIBERTY,
EQUALITY, FRATERNITY (1873)**

As to Mr. Mill's doctrine that the coercive influence of public opinion ought to be exercised only for self-protective purposes, it seems to me a paradox so startling that it is almost impossible to argue against it. A single consideration on the subject is sufficient to prove this. The principle is one which it is simply impossible to carry out. It is like telling a rose that it ought to smell sweet only for the purpose of affording pleasure to the owner of the ground in which it grows. People form and express their opinions on each other, which, collectively, form public opinion, for a thousand reasons; to amuse themselves; for the sake of something to talk about; to gratify this or that momentary feeling; but the effect of such opinions, when formed, is quite independent of the grounds of their formation. A man is tried for murder, and just escapes conviction. People read the trial from curiosity; they discuss it for the sake of the discussion; but if, by whatever means, they are brought to think that the man was in all probability guilty, they shun his society as they would shun any other hateful thing. The opinion produces its effect in precisely the same way whatever was its origin.

The result of these observations is that both law and public opinion do in many cases exercise a powerful coercive influence on morals, for objects which are good in the sense explained above, and by means well calculated to attain those objects, to a greater or less extent at a not inadequate expense. If this is so, I say law and public opinion do well, and I do not see how either the premises or the conclusion are to be disproved.

Of course there are limits to the possibility of useful interference with morals, either by law or by public opinion; and it is of the highest practical importance that these limits should be carefully observed. The great leading principles on the subject are few and simple, though they cannot be stated with any great precision. It will be enough to mention the following:

1. Neither legislation nor public opinion ought to be meddlesome. A very large proportion of the matters upon which people wish to interfere with their neighbours are trumpery little things which are of no real importance at all. The busybody and world-betterer who will never let things alone, or trust people to take care of themselves, is a common and a contemptible character. The commonplaces directed against these small creatures are perfectly just, but to try to put them down by denying the connection between law and morals is like shutting all light and air out of a house in order to keep out gnats and blue-bottle flies.
2. Both legislation and public opinion, but especially the latter, are apt to be most mischievous and cruelly unjust if they proceed upon imperfect evidence. To form and express strong opinions about the wickedness of a man whom you do not know, the immorality or impiety of a book you have not read, the merits of a question on which you are uninformed, is to run a great risk of inflicting a great wrong. It is hanging first and trying afterwards, or more frequently not trying at all. This, however, is no argument against hanging after a fair trial.
3. Legislation ought in all cases to be graduated to the existing level of morals in the time and country in which it is employed. You cannot punish anything which public opinion, as expressed in the common practice of society, does not strenuously and unequivocally condemn. To try to do so is a sure way to produce gross hypocrisy and furious reaction. To be able to punish, a moral majority must be overwhelming. Law cannot be better than the nation in which it exists, though it may and can protect an acknowledged moral standard, and may gradually be increased in strictness as the standard rises. We punish, with the utmost severity, practices which in Greece and Rome went almost uncensored. It is possible that a time may come when it

may appear natural and right to punish adultery, seduction, or possibly even fornication, but the prospect is, in the eyes of all reasonable people, indefinitely remote, and it may be doubted whether we are moving in that direction.

4. Legislation and public opinion ought in all cases whatever scrupulously to respect privacy. To define the province of privacy distinctly is impossible, but it can be described in general terms. All the more intimate and delicate relations of life are of such a nature that to submit them to unsympathetic observation, or to observation which is sympathetic in the wrong way, inflicts great pain, and may inflict lasting moral injury. Privacy may be violated not only by the intrusion of a stranger, but by compelling or persuading a person to direct too much attention to his own feelings and to attach too much importance to their analysis. The common usage of language affords a practical test which is almost perfect upon this subject. Conduct which can be described as indecent is always in one way or another a violation of privacy. * * *

[It] may perhaps be said that the principal importance of [regulating vice] by criminal law is that in extreme cases it brands gross acts of vice with the deepest mark of infamy which can be impressed upon them, and that in this manner it protects the public and accepted standard of morals from being grossly and openly violated. In short, it affirms in a singularly emphatic manner a principle which is absolutely inconsistent with and contradictory to Mr. Mill's—the principle, namely, that there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity. * * *

If people neither formed nor expressed any opinions on their neighbours' conduct except in so far as that conduct affected them personally, one of the principal motives to do well and one of the principal restraints from doing ill would be withdrawn from the world.

NOTE: MODERN REPLAYS

Philosophers and constitutional theorists continue to debate the normative questions posed by Mill and Stephen. What is harm? What is "self-regarding"? Should government regulate morals? Should government concern itself with people bent on their own self-destruction? Are there certain categories of choices that surely belong in a protected, hands-off private sphere—religion perhaps, reproduction, consensual adult sex? Should government have a hand in reinforcing both personal commitments and cultural traditions, communities and identities not of our own choosing?

Philosopher Joel Feinberg reframed the debate that Mill started over the legitimacy of government interference. Feinberg endorsed a presumption in

favor of liberty. Such a presumption places the burden of proof on government to justify any interference with liberty. Accordingly, the question of justice is not, why privacy, but rather why not? Everything belongs in the category of the private until the government comes up with a good reason to take something out. Coercion, not privacy or private choice, needs legitimizing.

Bernard Harcourt explains the famous Hart-Devlin debate of the 1950's as a replay of the Mill-Stephen debate of a hundred years prior. He then persuasively argues that the terms of debate have shifted in the U.S. We do not debate the propriety of regulating morals, as much as we debate whether and how immoralities are sufficiently harmful to merit criminal regulation. Robert George is a contemporary scholar who takes us back to the original terms of debate, defending head-on the practice of regulating to protect and improve public morals. His language though, is calculated to resonate with 21st century audiences—we ought to regulate morals to safeguard society's "moral ecology".

JOEL FEINBERG, HARM TO OTHERS

(1984) pp. 9-13

While it is easy to overemphasize the value of liberty, there is no denying its necessity, and for that reason most writers on our subject have endorsed a kind of "presumption in favor of liberty" requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification. * * * [T]he person deprived of a liberty will think of its absence as a genuine personal loss, and when we put ourselves in his shoes we naturally share his assessment. Moreover, loss of liberty both in individuals and societies entails loss of flexibility and greater vulnerability to unforeseen contingencies. Finally, free citizens are likelier to be highly capable and creative persons through the constant exercise of their capacities to choose, make decisions and assume responsibilities. Perhaps these simple truisms, by no means the whole of the case for liberty, are nevertheless sufficient to establish some presumption in liberty's favor, and transfer the burden of argument to the shoulders of the advocate of coercion who must, in particular instances, show that the standing case for liberty can be overridden by even weightier reasons on the side of the scales. * * *

[W]hat kinds of reasons can have weight when balanced against the presumptive case for liberty? Answers to this question take the form of what I shall call "liberty-limiting principles" (or equivalently, "coercion-legitimizing principles"). A liberty-limiting principle is one which states that a given type of consideration is always a morally relevant reason in support of * * * legislation even if other reasons may in the circumstances outweigh it. * * *

About one class of crimes there can be no controversy. [Crimes against the person, such as rape and murder are crimes everywhere in the world.] Almost as noncontroversial as these serious "crimes against the person" are various serious "crimes against property": burglary, grand larceny, and various offenses involving fraud and misrepresentation. The common element in crimes of these two categories is the direct production of serious harm to individual persons and groups. Other kinds of properly prohibited behavior, like reckless driving and discharging of lethal weapons, are banned not because they necessarily cause harm in every case, but rather because they create unreasonable risks of harm to other persons.

Still other crimes that have an unquestioned place in our penal codes are kinds of conduct that rarely cause clear and substantial harm to any specific person or group, but are said to cause harm to "the public," "society," "the state," public institutions or practices, the general ambience of neighborhoods, the economy, the climate, or the environment. Typical crimes in this general category are counterfeiting, smuggling, income tax evasion, contempt of court, and violation of zoning and antipollution ordinances. * * *

Generalizing then from the clearest cases we can assert tentatively that it is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices * * *. [C]oncisely, the need to prevent harm (private or public) to parties other than the actor is always an appropriate reason for legal coercion. This principle * * * can be called "the harm principle" for short * * *. John Stuart Mill argued in effect that the harm principle is the only valid principle for determining legitimate invasions of liberty * * *.

The harm principle * * * is a useful starting place * * *. Clearly not every kind of act that causes harm to others can be rightly prohibited, but only those that cause avoidable and substantial harm. * * * So the harm principle must be made sufficiently precise to permit the formulation of a criterion of "seriousness" * * * [f]or virtually every kind of human conduct can affect the interests of others for better or worse to some degree. * * *

The more radical view of Mill's that such considerations are the only relevant reasons cannot be evaluated until the classes of reasons put forth by other candidate principles have been examined. Most writers would accept at least some additional kinds of reasons as equally legitimate. Three others have won widespread support. It has been held (but not always by the same person) that: (1) it is reasonably necessary to prevent hurt * * * or offense (as oppose to injury or harm) to others (the offense principle); (2) it is reasonably necessary to prevent harm to the very person it prohibits from acting, as opposed to "others" (legal paternalism); (3) it is reasonably necessary to prevent inherently immoral

conduct whether or not such conduct is harmful or offensive to anyone (legal moralism). An especially interesting [fourth] position *** holds that a good reason for restricting a person's liberty is that it is reasonably necessary to prevent moral *** harm to the person himself. This view, which provides one of the leading rationales for the prohibition of pornography, can be labeled moralistic paternalism.

**BERNARD E. HARCOURT, CRIMINAL LAW: THE
COLLAPSE OF THE HARM PRINCIPLE**

90 J. Crim. L. & Criminology 109 (1999).

The harm principle traces back to John Stuart Mill's essay *On Liberty*. ***

Beginning at least in the 1950s, liberal theorists, most prominently Professors H.L.A. Hart and Joel Feinberg, returned to Mill's original, simple statement of the harm principle. The context was the debate over the legal enforcement of morality. In England, this debate was reignited by the recommendation of the Committee on Homosexual Offences and Prostitution (the "Wolfenden Report") that private homosexual acts between consenting adults no longer be criminalized. In the United States, the debate was reignited by the Supreme Court's struggle over the definition and treatment of obscenity and the drafting of the Model Penal Code. In both countries, the debate was fueled by the perception among liberal theorists that legal moralist principles were experiencing a rejuvenation and were threatening to encroach on liberalism.

More than anyone else, Lord Patrick Devlin catalyzed this perceived threat. In his Maccabaeian Lecture, delivered to the British Academy in 1959, Lord Devlin argued that purportedly immoral activities, like homosexuality and prostitution, should remain criminal offenses. Lord Devlin published his lecture and other essays under the title *The Enforcement of Morals*, and Devlin soon became associated with the principle of legal moralism—the principle that moral offenses should be regulated because they are immoral.

The Hart-Devlin exchange structured the debate over the legal enforcement of morality, and thus there emerged, in the 1960s, a pairing of two familiar arguments—the harm principle and legal moralism. All the participants at the time recognized, naturally, that this structure was a recurrence of a very similar pairing of arguments that had set the contours of the debate a hundred years earlier. The Hart-Devlin debate replicated, in many ways, the earlier debate between Mill and another famous British jurist, Lord James Fitzjames Stephen. ***

Though the paired structure of arguments was similar, it was not exactly the same. In contrast to Stephen's straightforward legal moralist argument, Lord Devlin's argument in *The Enforcement of Morality* was

ambiguous and susceptible to competing interpretations. Devlin's argument played on the ambivalence in the notion of harm—at times courting the idea of social harm, at other times aligning more closely with the legal moralism of his predecessor. As a result, the conservative position began to fragment and there developed at least two interpretations of Devlin's argument: the first relied on public harm, the second on legal moralism. Professors Hart and Feinberg labeled these two versions, respectively, the moderate thesis and the extreme thesis.

A * * * shift in justification is evident in a wide range of debates over the regulation or prohibition of activities that have traditionally been associated with moral offense—from prostitution and pornography, to loitering and drug use, to homosexual and heterosexual conduct. In a wide array of contexts, the proponents of regulation and prohibition have turned away from arguments based on morality, and turned instead to harm arguments * * *.

Similarly, in the pornography debate, Professor Catharine MacKinnon has proposed influential administrative and judicial measures to regulate pornographic material. Her enforcement proposals, again, are not based on the immorality of pornography. Instead, the principal justification is the multiple harms that pornography and commercial sex cause women. "The evidence of the harm of such material," MacKinnon explains, "shows that these materials change attitudes and impel behaviors in ways that are unique in their extent and devastating in their consequences." MacKinnon's provocative discourse, and her vivid descriptions of injury, violence, and rape, are all about harm. In a similar vein, the recent crack-down on commercial sex establishments—peep shows, strip clubs, adult book and video stores—in New York City has been justified in the name of tourism, crime rates, and property value, not morality.

A similar development has taken place in the debate over homosexuality. In the 1980s, the AIDS epidemic became the harm that justified legal intervention. When San Francisco and New York City moved to close gay bathhouses in the mid-1980s, the argument was not about the immorality of homosexual conduct. Instead, the debate was about the harm associated with the potential spread of AIDS at gay bathhouses * * *.

This is illustrated also in the ongoing controversy over the legalization of marijuana and other psychoactive drugs. In response to a wave of enforcement of anti-drug policies in the 1980s—a wave of enforcement that was justified because of the harms associated with drug use and the illicit drug trade—the movement for drug policy reform has increasingly turned to the argument of "harm reduction." Whereas thirty years ago the opponents of criminalization talked about marijuana use as a "victimless crime"—as not causing harm to others—the opponents of

criminalization now emphasize the harms associated with the war on drugs. * * *

The shift has had a dramatic effect on the structure of the debate. It has, in effect, undermined the structure itself. In contrast to the earlier pairing of harm and legal moralist arguments, or even to the later dominance of the harm argument over legal moralism, today the debate is no longer structured. It is, instead, a harm free-for-all: a cacophony of competing harm arguments without any way to resolve them. There is no argument within the structure of the debate to resolve the competing claims of harm. The only real contender would have been the harm principle. But that principle provides no guidance to compare harm arguments. Once a non-trivial harm argument has been made and the necessary condition of harm has been satisfied, the harm principle has exhausted its purpose. The triumph and universalization of harm has collapsed the very structure of the debate.

**ROBERT P. GEORGE, FORUM ON PUBLIC MORALITY: THE
CONCEPT OF PUBLIC MORALITY**

45 Am. J. Juris. 17 (2000).

Public morality, like public health and safety, is a concern that goes beyond considerations of law and public policy. Public morals are affected, for good or ill, by the activities of private (in the sense of "nongovernmental") parties, and such parties have obligations in respect to it. The acts of private parties—indeed, sometimes even the apparently private acts of private parties—can and do have public consequences. And choices to do things that one knows will bring about these consequences, whether directly or indirectly (in any of the relevant senses of "directly" and "indirectly") are governed by moral norms, including, above all, norms of justice. Such norms will often constitute conclusive reasons for private parties to refrain from actions that produce harmful public consequences.

Let us for just a moment lay aside the issue of public morality and focus instead on matters of public health and safety. Even apart from laws prohibiting the creation of fire hazards, for example, individuals have an obligation to avoid placing persons and property in jeopardy of fire. Similarly, even apart from legal liability in tort for unreasonably subjecting people to toxic pollutants, companies are under an obligation in justice to avoid freely spewing forth, say, carcinogenic smoke from their factories. Concerns for public health and safety are, to be sure, justificatory grounds of criminal and civil laws; but they also ground moral obligations that obtain even apart from laws or in their absence.

What is true of public health and safety is equally true of public morals. Take, as an example, the problem of pornography. Material designed to appeal to the prurient interest in sex by arousing carnal

desire unintegrated with the procreative and unitive goods of marriage, where it flourishes, damages a community's moral ecology in ways analogous to those in which carcinogenic smoke spewing from a factory's stacks damages the community's physical ecology.

NOTE: APPROACHING THE CONSTITUTION

Now we begin at the beginning, with the First Amendment. The relevance of the Mill-Stephen and the Hart-Devlin normative debates becomes clear as we see the federal courts struggling with the question of where to draw the line between public regulation and private choice. Can government outlaw polygamy? Can it mandate attending school? But the Mill-Stephen, Hart/Devlin debates do not exhaust the philosophical dilemmas posed in the First Amendment privacy cases. We face dilemmas, too, of how to situate individuals within families and social groups that claim power over them. Online social media introduce legal challenges for privacy and free speech that were unimagined by Mill and Hart.

The courts are guided by the text of the First Amendment and precedent. But like philosophers interpreting the abstract demands of "justice," judges interpreting the demands of "free exercise" and "freedom" are impelled by their own values and those embodied in the history and traditions of the communities they serve.

C. FIRST AMENDMENT PRIVACY

1. THE FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. EXERCISING RELIGIOUS FREEDOM

NOTE: TOLERATION

The First Amendment of the U.S. Constitution calls for religious freedom and tolerance. Government is not generally entitled to dictate or forbid a system of spiritual beliefs and practices. Minority and unpopular religions are supposed to be tolerated, majority and popular religions held at bay. Religion is, in this respect, private.

Does the privacy of religion mean that anything goes, if it is pursued on the basis of sincerely held religious belief? Under the First Amendment, the privacy of religion is not absolute. Religion is not license, for example, to break the criminal law or the child labor laws. See *Prince v. Massachusetts*, 321 U.S. 158 (1944), in which the Court acknowledged "the private realm of family life which the state cannot enter," but upheld child labor laws that

C. Political and Philosophical Controversy

1. Politics

Politically, "the right to privacy" has been on the frontlines of the U.S. culture wars. By "cultural wars," I mean the acrid, divisive debates over values repeatedly played out in town halls, the media, social media and the courts. When the foes in a skirmish are social conservatives and traditionalists, on the one hand, and social liberals, libertarians and progressives on the other, it is not always clear which side gets the most mileage out of appeals to privacy rights. In fact, a careful study of privacy law reveals that "the right to privacy" has proven to be a double-edged sword in battles between many sets of political enemies.

As you will see in the pages of this book, in the American South, segregationists used the "right to privacy" to maintain white-only social clubs; but integrationists, like the NAACP, used the same "right to privacy" to fight off state efforts to foil the civil rights movement through intimidation. More recently, social conservatives who wished to exclude homosexuals from their parades and civic groups employed "the right to privacy" to win cherished rights of exclusion. But "the right to privacy" is also the banner under which permissive abortion rights and social freedoms enjoyed by heterosexuals have been won for lesbian and gay Americans.

Feminist lawyers strategically embraced "the right to privacy," hoping to prevail in reproductive rights cases, but were disappointed that variants of the public-private distinction stood in the way of mandatory government abortion funding for the poor and protections against violence and denigrating pornography. Civil libertarians have been staunch defenders both of free speech and "the right to privacy." But their efforts to learn the identities of suspects detained in the post-9/11 campaign against terrorism were rebuffed by government officials asserting the "right to privacy" of prisoners.

Civil libertarians have advocated for strong rights of privacy against government. But public interest advocates have discovered that governments will use the privacy of its citizens, employees and work product as reasons not to respond eagerly to freedom of information law requests.

2. Ethics and Philosophy

Moral, legal and political philosophers have often greeted the term "privacy" as if it were an unruly beast at the door of modern thought. Can "privacy" be tamed? Does it really need to be? Describing "privacy" as elusive, vague and confusing, academic theorists have attempted to prescribe conceptual rigor. Efforts at imposing rigor through precise definitions go back to the 1960's. See, e.g., Alan P. Bates, Privacy—A

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Useful Concept? 42 *Social Forces* 429 (1964); Alan F. Westin, *Privacy and Freedom* (1967). See generally, Ferdinand D. Schoeman, *The Social Dimensions of Privacy* (1984) (first major anthology of philosophy articles about the meaning and value of privacy).

"The right to privacy" frustrates theorists who believe the law's use of the term "privacy" is especially confusing. Of particular concern has been the use of "privacy" in connection with (1) the "false light" and "appropriation" torts, examined here in Chapter 1; (2) the interpretation of 14th Amendment liberty, examined in Chapter 2; and (3) high-tech data protection and security, examined in Chapters 3, 4 and 5. Regarding (3)—data protection and security—to avoid further expansion of privacy discourse as society moves to address the ethical and legal implications of surveillance and digital communications, some theorists prefer to speak of a "right to control data" or a "right to manage information flow" rather than a "right to privacy."

Yet individuals, families and groups boldly claim "privacy" rights. Litigants appeal to the "privacy" rights embodied in judge-made law. Cf. Adam D. Moore, *Privacy Rights: Moral and Legal Foundations* (2010); and Adam D. Moore, *Information Ethics: Privacy, Property and Power* (2013). Legislators enact what they call "privacy" statutes. Lawyers and law firms boast specialties in "privacy" law. Professional organizations and legal advocacy groups make "privacy" their particular focus. A forest of privacy-promoting rules, principles and policies has grown up around a thicket of theoretical debates about how, if at all, the word "privacy" should be used in the law.

Forty years ago, when the body of what this textbook terms "privacy law" was substantially smaller, scholarly attempts to prescribe a more limited usage of "privacy" may have made some headway. But monumental growth in the volume of "privacy" statutes, combined with the popularity of the word "privacy" in everyday life has undercut the usefulness of calls for linguistic purity. A better agenda for theorists today is (1) to distinguish the varied uses of "privacy" in law and society, hoping to reduce the potential for confusion in the minds of newcomers to the field; and (2) to clearly explicate the costs, benefits and values associated with whatever "privacy" is intended to denote.

D. What "Privacy" Means in the Law

Consider the diverse range of things ordinary people and legal professionals refer to when they speak of privacy. In everyday parlance, invasions of "privacy" include: (1) physical intrusions, such as a voyeuristic landlord hiding in a tenant's bedroom; (2) informational intrusions, such as a curious employer reading an employee's personal email just for fun; (3) decisional intrusions, such as states banning assisted suicide or polygamy; (4) proprietary intrusions, such as an

advertiser using someone's photograph without permission; and (5) associational intrusions, such as an unwelcome person demanding membership in an exclusive club. Cf. Anita L. Allen, *Privacy, Encyclopedia of Privacy* (ed. William Staples, 2007), distinguishing several senses of privacy. Profession Neil Richards and others discern another notion of privacy invasion immanent in the law, namely, invasion of (6) intellectual privacy, such as criminal prosecution for viewing materials depicting cruelty to animals. Cf. Neil Richards, *Intellectual Privacy*, 87 *Texas Law Review* 387 (2008).

1. Examples of Everyday Usage

Physical Privacy. Peeping into someone else's bedroom and planting secret recording devices are described as invasions of privacy. Solitude and intimate seclusion can be vital to the enjoyment of privacy in a physical, bodily, territorial or spatial sense. Though no guarantor of repose, the home is often the heart of private life, and a domain culturally marked for the enjoyment of the highest expectations of physical privacy from strangers. The desire for physical privacy often drives legal complaints about unlawful search and seizure, peeping Toms, trespass, "revenge porn" and "ambush journalism". Bodily integrity, an important, additional physical privacy concern, comes up in legal discussions of everything from the right to refuse medical care to roadside sobriety testing.

Informational Privacy. The law allows employers access to employees' work-related emails. Yet employers who read employees' personal email messages without a legitimate business purpose offend morals and manners, violating expectations of privacy in an informational sense. Confidentiality, data protection, data encryption, data security, secrecy, anonymity and adherence to fair information practices comprise an informational dimension of privacy. Limits on the duration of data retention are widely recognized as a means of protecting informational privacy. Regulating informational privacy, *i.e.*, ensuring that individuals can exercise control over information about them, is the overwhelming focus of modern privacy law.

Decisional Privacy. Adult incest and polygamy bans illustrate a denial by government of privacy in a decisional sense of the term. Not without heated controversy in jurisprudential circles, the term "privacy" has come to denote freedom from government interference with personal life. Like it or not, the rights of individuals, married couples, and families to direct their own lives are commonly styled as privacy rights. Disagreements about the proper limits of decisional privacy have fueled moral debates over gay rights, abortion and physician-assisted suicide; along with recreational drug use, and choice of hairstyles and attire.

Proprietary Privacy. Advertisers who make use of individuals' photographs without permission illustrate a loss of privacy in a proprietary sense. In general, the rights of celebrities and others to control the attributes of their personal identities—their likenesses, names, monikers, voices, trademarks, DNA and social security numbers—are commonly styled as privacy concerns. Government regulators and the general public characterize "identity theft" and data breaches as privacy problems. Because identity theft entails seizing otherwise confidential information and personal identifiers, it evokes notions of both informational and proprietary privacy.

Associational Privacy. Seeking membership, inclusion or access to an otherwise closed group invades privacy in an associational sense. The ability to meet alone with selected individuals of one's own choosing is described as privacy, whether the purpose of meeting is sexual, political, civic, cultural or religious. Discriminatory exclusion makes people uncomfortable, but the rhetoric of "privacy" has been used in asserting entitlement to shut out people with unwanted races, religions, sexes, or sexual orientations. Associational privacy is buttressed by strong rights of physical, informational and decisional privacy.

Intellectual Privacy. Mental repose is a kind of privacy. And when the aim of letting others alone with their thoughts is to grant them freedom to think forbidden thoughts, mull over controversial ideas, produce creative works, or engage in intimate discussion, we can speak of intellectual privacy. The point of intellectual privacy is not to enable everyone to write the great novel, blog or political manifesto. The kind of intellectual freedom courts and lawyers often defend is a freedom that could as easily be put to enjoying homemade pornography as to pondering Nobel prize-winning physics.

All six of the foregoing everyday senses of "privacy" have wide currency in contemporary legal discourse. Indeed, privacy law could be summed up as the set of legal rules, principles and policies that regulate physical, informational, decisional, proprietary, associational and intellectual privacies. Cf. Neil Richards, *The Information Privacy Law Project*, 94 *Geo. L.J.* 1087 (2006), distinguishing informational and decisional privacy as the major subject-matters of privacy law and arguing that common values warrant protecting both; Daniel Solove, *A Taxonomy of Privacy*, 154 *U. Pa. L. Rev.* 477 (2006), attempting a prescriptive new formulation of legal privacy.

Its varied meanings in the law have confounded repeated attempts to come up with a single useful definition of "privacy" or the right to it. See, e.g., W. A. Parent, *Privacy, Morality and the Law*, 12 *Philosophy and Public Affairs*, 269 (1983). Legal privacy has been defined as the right to be let alone, the right to control information, the condition of limited

accessibility and the contextual integrity of data flows. It has been identified with autonomy, intimacy, liberty and property. Privacy has been described for decades now as a general or "umbrella" concept. See, e.g., Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society*, p. 18 ("privacy is best viewed as a kind of parent or umbrella concept"). Privacy so conceived encompasses solitude, seclusion, confidentiality, secrecy, anonymity, data protection, data security, fair information practices, modesty and reserve. One commentator has concluded that because "[p]rivacy is a generic label for a grab bag of values and rights, [t]o arrive at a general definition of privacy would be no easier today than finding a consensus on a definition of freedom." See Simon G. Davies, Re-Engineering the Right to Privacy: How Privacy has been Transformed from a Right to a Commodity, in *Technology and Privacy: the New Landscape* 143, 153 (eds., Philip E. Agre & Marc Rotenberg 1997).

2. No Purely Private Sphere

"Privacy" is used in a number of distinct ways in the law, and so is the distinction between "public" and "private." The distinction variously dichotomizes the governmental and the non-governmental; the official and the unofficial; the open and the secret; the societal and the individual; and the communal and the personal. See generally, Howard B. Radest, *The Public and the Private: An American Fairy Tale*, 89 *Ethics* 280, 280-88 (1979).

A sacrosanct private sphere is a tempting moral construct. But a walled-off private domain does not exist in the law. Virtually every aspect of nominally private life is a focus of direct or indirect government regulation. Marriage is considered a private relationship, yet governments require licenses and medical tests, impose age limits, and prohibit polygamous and incestuous marriages. Procreation and childrearing are considered private, but government child-abuse and neglect laws regulate, if at times inadequately, how parents and guardians must exercise their responsibilities. The private sphere, for legal purposes, can only be understood as the ability of ordinary citizens to make many choices and live lives that are relatively free of the most direct forms of outside intrusion, interference and constraint.

As explained by philosopher Hannah Arendt, the Greeks distinguished the "public" sphere of the polis, or city-state, from the "private" sphere of the *oikos*, or household. The Romans similarly distinguished *res publicae*, concerns of the community, from *res privatae*, concerns of individuals and families. The ancients celebrated the public sphere as the sphere of political freedom for citizens. By contrast, the private realm was the sector of economic and biologic necessity. Wives, children, and slaves were denizens of the private sphere, living as subordinates to more autonomous male caretakers. See Hannah Arendt,

The Human Condition 38–78 (1958). See also Jürgen Habermas, *The Structural Transformation of the Public Sphere* 3–4 (1962) (echoing Arendt). These ancient distinctions may have a relevant legacy: many of the characteristic activities of the household carry the aura of appropriately private activities, even though the modern state respects no impervious boundary at the threshold. Collective welfare, sometimes construed broadly to include economic, social and moral welfare, prompts incursions into home life and the presumptively “hands-off” territories of personal identity, free expression and autonomous moral responsibility.

E. Competing Values

Explicit privacy rights emerged in the 19th century in the United States in response to problems of unwanted publicity and physical intrusion; expanded in the 20th century in response to problems of unwanted surveillance and social control; and continue in the 21st century as reactions to consumer, corporate and governmental applications of information and surveillance technologies. It is likely that “the right to privacy” will be an enduring feature of American law.

1. The Case for Privacy Protection

Scholars argue that various forms of privacy are conditions, values and social practices, well worth legal protection. See, e.g., Beate Roessler, and Dorota Mokrosinska, *The Social Dimensions of Privacy: Interdisciplinary Perspectives* (2015); Beate Roessler and Rupert D.V. Glasgow, *The Value of Privacy* (2005), Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (2009); Daniel Solove, *The Digital Person: Technology and Privacy in the Information Age* (2004); Judith W. DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (1997); Patricia Boling, *Privacy and the Politics of Intimate Life* (1996); Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (1988) and *Unpopular Privacy: What Must We Hide* (2011); Ferdinand Schoeman, *Philosophical Dimensions of Privacy: An Anthology* (1984); Alan F. Westin, *Privacy and Freedom* (1967); and Glenn Negley, *Philosophical Views on the Value of Privacy*, 31 *Law and Contemporary Problems* 319 (1966).

To briefly summarize the essence of a subtle literature, opportunities for privacy are said to allow individuals better to express their true personalities, preserve their reputations, relax, create, and reflect. Opportunities for privacy are thought to enable individuals to keep some people at a distance, so that they can enjoy intense intimate relationships with others on their own terms. See Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000). Cf. Erving Goffman, *The Presentation of Self in Everyday Life* (1959).

Privacy affords the individual and groups of like-minded individuals the opportunity to plan undertakings and live in harmony with their own

preferences and traditions. See Ferdinand Schoeman, *Privacy and Social Freedom* (1992). Privacy norms sustain civility by condemning behaviors that offend courtesy, honor and appropriateness. See Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law*, 77 *Calif. L. Rev.* 957 (1989). Cf. James Q. Whitman, *Two Western Cultures of Privacy: Dignity v. Liberty*, 113 *Yale L.J.* 1151 (2004).

Philosophers have argued that respect for privacy is, in many ways, respect for human dignity itself. See Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.U.L. Rev.* 34 (1967); see also Stanley I. Benn, *Privacy, Freedom and Respect for Persons*, *Nomos VIII: Privacy* (eds. J. Roland Pennock & John W. Chapman, 1971). Respect for privacy has also been described as regard for social practices that constitute a society of distinct individuals. See Jeffrey Reiman, "Privacy, Intimacy and Personhood," 6 *Philosophy and Public Affairs* 26 (1976). Privacy has been characterized as a valued dynamic scope for "self-making" and "critical subjectivity". See Julie E. Cohen, *What is Privacy For?*, 126 *Harvard Law Review* 1904-1933 (2013).

Privacy rights against government demand that state power is limited and unobtrusive, as liberal democracy requires. See Jed Rubenfeld, *The Right to Privacy*, 102 *Harv. L. Rev.* 737 (1989), (arguing that privacy rights protect against totalitarian government). Privacy rights demand that government tolerate differences. See David A.J. Richards, *Toleration and the Constitution* (1986). Privacy rights aim to ensure that those who disagree with fellow citizens will not be permitted by the state to impose their values on them, or force them to live as they live. See Joel Feinberg, *The Nature and Value of Rights*, 4 *J. Value Inquiry* 243, 252 (1970). An aspect of liberty, privacy thus fosters the development and exercise of moral autonomy. See James Rachels, *Why Privacy is Important*, 4 *Philosophy and Public Affairs* 323-33 (1975). But see Catharine A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* 96-102 (1987), arguing that abortion privacy furthers male autonomy more than female autonomy or equality.

Is privacy a purely individualistic value, at odds with ideals of cooperative, efficient, democratic community? Anita L. Allen has argued that privacy makes us more fit for our social responsibilities and participation in group life. To the extent that self-governing communities benefit from the psychological well-being and independent judgments of their members, privacy is a distinctly social good. See C. Keith Boone, *Privacy and Community*, 9 *Social Theory and Practice* 1, 6-24 (1983). But the relationship between a public life and an intimate private one may be less neat, as suggested by Emily Zakin, *Crisscrossing Cosmopolitanism: State Phobia, World Alienation, and the Global Soul*, 29 *The Journal of Speculative Philosophy* 58-72 (2015) (eclipse of the public realm intrinsic to liberal conception of progress).

Opinion polls suggest that ordinary Americans value their privacy. See, e.g., the results of 2015 Pew Research polling, <http://www.pewinternet.org/2015/05/20/americans-views-about-data-collection-and-security/>; see generally EPIC's privacy poll pages, <http://epic.org/privacy/survey/>. Yet, not every group values the same forms of privacy equally. See Oscar H. Gandy, African Americans and Privacy: Understanding the Black Perspective in the Emerging Policy Debates, 24 *J. of Black Studies* 178 (1993). Moreover, the same individual may value his or her own privacy inconsistently and in response to how the stakes of protection are framed, see Alessandro Acquisiti, Leslie K. John, and George Loewenstein, What is Privacy Worth?, 42 *Journal of Legal Studies* 249–274 (2013).

Privacy norms are complex and highly contextual: "Privacy is structured by situational contexts". See Alan P. Bates, Privacy—A Useful Concept? 42 *Social Forces* 429 (1964). See also Helen Nissenbaum, Privacy as Contextual Integrity, 79 *Wash. L. Rev.* 119, 136–143 (2004). Cf. Anita L. Allen, *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability* (2003), arguing that context-specific norms of accountability and privacy mark interpersonal relationships. The person who speaks about her medical problems on a cell phone in public places might balk at the thought that her physician would reveal confidential medical information to a third-party without her consent. The same person who would not wish his bank to reveal his checking account balance to a stranger might choose to appear on television and detail his financial woes to an empathetic talk show host. The proliferation of tell-all books, reality television shows, blogs and social networking websites suggests that people value opportunities both for intimate confidential disclosure and reckless exhibitionism. See generally Leslie K. John, Alessandro Acquisiti and George Loewenstein, Strangers on a Plane: Context Dependent Willingness to Divulge Sensitive Information, 37 *Journal of Consumer Research* 858–873 (2011).

2. The Case Against Privacy Protection

Not every wounded privacy interest is tended by the law. As you are about to learn, the law provides a remedy only against intrusions and publications that are "highly offensive". It protects only "reasonable expectations of privacy" and bars state interference only if it is wholly irrational or "unduly burdensome".

Students of American privacy law come quickly to appreciate that privacy rights are not absolute. But see Amitai Etzioni, *The Limits of Privacy* (1999), arguing that U.S. law treats privacy rights as absolute at the expense of the common good. Not only do legal privacy rights provide less than absolute protection of privacy interests, some privacy laws were enacted to *regulate* access to people and information, not to *prohibit* such

access. At their strongest, government privacy regulations—and corporate privacy policies—adhere to widely promulgated Fair Information Practice Standards whose scope and origin are detailed in Chapter 3.

From a legal perspective, interests opposing privacy interests matter too, as they must in a well-ordered society. In crafting privacy rules, U.S. courts, legislatures and regulatory authorities balance privacy interests against others with which they compete. In constitutional law, even “fundamental” privacy rights give way to interests that are “compelling”. Generally, freedom from unwanted publicity competes with accountability, newsworthiness, and freedom of speech. The interest in private conversation and anonymous travel competes with the interest in law enforcement and national security. But see, Tiberiu Dragu, *Is There a Trade-off between Security and Liberty? Executive Bias, Privacy Protections, and Terrorism Prevention*, 105 *American Political Science Review* 64–78 (bias of policy makers against privacy may harm security). The interest in the confidentiality of health records competes with the need for public health research and insurance integrity. The employee’s interest in workplace privacy competes with the employer’s need for efficiency and supervision.

Although some experts believe the U.S. needs more privacy laws, other experts believe it already has too many and still others that privacy laws in place may fail to work for predictable reasons. As a practical matter, privacy rights potentially keep socially valuable information out of the hands of people who could use and learn from it. Privacy rights also may introduce economic inefficiencies into society. See Richard A. Posner, *The Right to Privacy*, 12 *Ga. L. Rev.* 393 (1987); *The Economics of Privacy*, 71 *Amer. Econ. Rev.* 405 (1981). But see Kim L. Scheppele, *Legal Secrets* (1988), defending strong privacy rights for individuals from a contractarian perspective. Cf. Jim Harper, *Understanding Privacy—and the Real Threats to It*, *Policy Analysis*, No. 520 (August 4, 2004), arguing that weak rather than strong privacy regulation could in some cases be better for consumers. Harper maintains that legal privacy rights conferred by government may actually undermine important privacy interests. But see Marc Rotenberg, *Privacy and Secrecy After September 11*, 86 *Minn. L. Rev.* 1115 (2002), defending privacy laws, but calling for more government accountability. The consequences of privacy laws require close examination of their distributive effects, see Lior Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 *Harvard Law Review* (2013); and because of their compliance limitation. Anita L. Allen argues that good-seeming privacy laws of general application may not equally deter privacy harms targeting men and women, see *Compliance-Limited Health Privacy Laws*, in ed. Beate Roessler and Dorota

Mokrosinska, *Social Dimensions of Privacy: Interdisciplinary Perspectives* (2015), 261–275.

F. International and European Privacy Law

Privacy law is a prominent feature of the US and Canadian legal systems. But “the right to privacy” is by no means a North American or exclusively western phenomenon. Cf. Kenneth Bamberger and Deidre Mulligan, *Privacy in Europe: Initial Data on Governance Choices and Corporate Practices*, 81 *George Washington Law Review* 1529 (2013); Edward L. Carter, *Argentina’s Right to be Forgotten*, *Emory International Law Review* (2013); N.A Moreham, *Beyond Information, Physical Privacy in English Law*, *Cambridge Law Journal* 350 (2014). See generally, Marc Rotenberg, *Privacy Law Sourcebook* (2006), compiling representative international laws and standards. See also Andrew T. Kenyon and Megan Richardson, *New Dimensions in Privacy Law: International and Comparative Perspectives* (2006) (online edition 2009).

Privacy protection is recognized as a human right in the 1948 U.N. Declaration on Human Rights. Article 12 of the Declaration provides that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Similarly, Article 17 of the binding Covenant on Civil and Political Rights provides that: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

The Council of Europe’s Convention on Human Rights and Fundamental Freedoms (ECHR) at Article 8 echoes the theme: “Everyone has a right to respect for his private and family life, his home and his correspondence.” The European Union Parliament and Council enacted a data privacy directive, Directive 95/46/EC “on the protection of individuals with regard to the processing of personal data and on the free movement of such data.” Along with subsequent Directives governing telecommunication, electronic communications and data retention, Directive 95/46/EC provides a strong, comprehensive foundation, shaping and harmonizing privacy law within and among the 28 member states comprising the union.

More recently, the European Charter of Fundamental Rights sets out a new conception of privacy. Article 8 of the Charter concerning the Protection of Personal Data states that “(1) Everyone has the right to the protection of personal data concerning him or her. (2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected

concerning him or her, and the right to have it rectified. (3) Compliance with these rules shall be subject to control by an independent authority." See, Peter Hustinx, "Data Protection in the Light of the Lisbon Treaty and the Consequences for Present Regulations," 11th Conference on Data Protection and Data Security, Berlin, 8 June 2009. The European Union is also in the midst of adopting a new General Data Protection Regulation. See Marc Rotenberg and David Jacobs, "Updating the Law of Information Privacy: The New Framework of the European Union," 36 *Harvard Journal of Law and Public Policy* 605-632 (2014).

Lawyers whose corporate clients operate abroad require detailed knowledge of foreign privacy laws. Unfortunately, a single textbook of reasonable length cannot thoroughly survey both US privacy law and the vast sweep of international privacy law. Chapter 5 of this book invites comparisons between US law and international or European privacy and data protection standards. For example, the chapter includes a Council of Europe response to the problem of media attention given to private life. Chapter 5 considers privacy as a human right in connection with the rights of homosexuals, transgender persons and medical consumers; it also examines European approaches both to the right to die and to government search and seizure. Chapter 5 identifies basic differences between American and European data protection standards. It describes the negotiated "Safe Harbor" agreement which for many years permitted U.S. multi-national firms committed to fair information practices to engage in trans-border data transactions from Europe, despite US non-conformity to European data-protection requirements. Cf. Paul Schwartz, *EU-US Privacy Collision: A Turn to Institutions and Procedures* 126 *Harvard Law Review* 1966 (2013). The chapter also examines recent decisions from the Court of Justice of the European Union on the so-called "Right to be Forgotten" as well as the the growing influence of the Article 8 jurisprudence of the European Court of Human Rights.

G. The Role of Technology

The modern conception of privacy law is also shaped in response to new technologies and new practices by business and government. Information technologies amplify the power of organizations and give rise to enormous data gathering and data analysis often without means of oversight or accountability. Bruce Schneier, *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World* (2015). Modern privacy law seeks to address this challenge through Fair Information Practices that allocate rights and responsibilities in the collection and use of personal information. Organizations as data holders take on the responsibilities while individuals, the data subjects, are given rights. In this manner, modern privacy law seeks to make the processing of personal data more open and more accountable. Marc Rotenberg, "Fair

Information Practices and the Architecture of Privacy," 2001 *Stanford Technology Law Review* 1 (2001).

The insight of technologists has also aided the understanding of modern privacy law, both to identify new risks and challenges and also to propose new solutions. Privacy Enhancing Technologies ("PETs") are techniques that are designed to minimize or eliminate the collection of personally identifiable information. Herbert Burkert, *Privacy-Enhancing Technologies: Typology, Critique, Vision in Technology and Privacy: the New Landscape* 143-67 (eds., Philip E. Agre & Marc Rotenberg 1997). As such, they help minimize risks in the collection and use of personal data. PETs and FIPs are complementary: as the collection of data is diminished so too is the allocation of liability under FIPs' regimes.

Technologists have also helped identify and assess legal regimes that may give rise to new privacy risks. For example, the policy debate over systems that are designed to enable government access to private communications has been the focus of computer security experts for many years. See, e.g., Whitfield Diffie and Susan Landau, *Privacy on the Line: The Politics of Wiretapping and Encryption* (1999).

Technologists have also engaged a wide variety of emerging privacy challenges, including identity management, revenge porn, data retention, and algorithmic transparency. See Marc Rotenberg, Julia Horwitz and Jeramie Scott, *Privacy in the Modern Age: The Search for Solutions* (2015).

Still, the need for privacy law remains. The former President of MIT and the first Presidential science advisor Jerome Weisner said to Congress in 1971:

There are those who hope new technology can redress these invasions of personal autonomy that information technology now makes possible, but I don't share this hope. To be sure, it is possible and desirable to provide technical safeguards against unauthorized access. It is even conceivable that computers could be programmed to have their memories fade with time and to eliminate specific identity. Such safeguards are highly desirable, but the basic safeguards cannot be provided by new inventions. They must be provided by the legislative and legal systems of this country. We must face the need to provide adequate guarantees for individual privacy.

Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcomm. On Constitutional Rights of the House Comm. on the Judiciary, 92d Cong., 1st Sess. Part I, 761-774 (1971) (testimony of Jerome B. Wiesner).

HARVARD

LAW REVIEW.

VOL. IV.

DECEMBER 15, 1890.

NO. 5.

THE RIGHT TO PRIVACY.

"It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage."

WILLES, J., in *Millar v. Taylor*, 4 Burr. 2303, 2312.

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in

fear of such injury. From the action of battery grew that of assault.¹ Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed.² So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose.³ Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable.⁴ Occasionally the law halted,—as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded.⁵ Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind,⁶

¹ Year Book, Lib. Ass., folio 99, pl. 60 (1348 or 1349), appears to be the first reported case where damages were recovered for a civil assault.

² These nuisances are technically injuries to property; but the recognition of the right to have property free from interference by such nuisances involves also a recognition of the value of human sensations.

³ Year Book, Lib. Ass., folio 177, pl. 19 (1356), (2 Finl. Reeves Eng. Law, 395) seems to be the earliest reported case of an action for slander.

⁴ *Winsmore v. Greenbank*, Willes, 577 (1745).

⁵ Loss of service is the gist of the action; but it has been said that "we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages." Cassoday, J., in *Lavery v. Crooke*, 52 Wis. 612, 623 (1881). First the fiction of constructive service was invented; *Martin v. Payne*, 9 John. 387 (1812). Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage. *Bedford v. McKowl*, 3 Esp. 119 (1800); *Andrews v. Askey*, 8 C. & P. 7 (1837); *Phillips v. Hoyle*, 4 Gray, 568 (1855); *Phelin v. Kenderdine*, 20 Pa. St. 354 (1853). The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, *e. g.*, the suffering of the parent in case of physical injury to the child. *Flemington v. Smithers*, 2 C. & P. 292 (1827); *Black v. Carrolton R. R. Co.*, 10 La. Ann. 33 (1855); *Covington Street Ry. Co. v. Packer*, 9 Bush, 455 (1872).

⁶ "The notion of Mr. Justice Yates that nothing is property which cannot be earmarked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple, but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., in *Jefferys v. Boosey*, 4 H. L. C. 815, 869 (1854).

as works of literature and art,¹ goodwill,² trade secrets, and trade-marks.³

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone."⁴ Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons;⁵ and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.⁶ The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago,⁷ directly involved the consideration

¹ Copyright appears to have been first recognized as a species of private property in England in 1558. Drone on Copyright, 54, 61.

² *Gibblett v. Read*, 9 Mod. 459 (1743), is probably the first recognition of goodwill as property.

³ *Hogg v. Kirby*, 8 Ves. 215 (1803). As late as 1742 Lord Hardwicke refused to treat a trade-mark as property for infringement upon which an injunction could be granted. *Blanchard v. Hill*, 2 Atk. 484.

⁴ Cooley on Torts, 2d ed., p. 29.

⁵ 8 Amer. Law Reg. N. S. 1 (1869); 12 Wash. Law Rep. 353 (1884); 24 Sol. J. & Rep. 4 (1879).

⁶ *Scribner's Magazine*, July, 1890. "The Rights of the Citizen: To his Reputation," by E. L. Godkin, Esq., pp. 65, 67.

⁷ *Marion Manola v. Stevens & Myers*, N. Y. Supreme Court, "New York Times" of June 15, 18, 21, 1890. There the complainant alleged that while she was playing in the Broadway Theatre, in a rôle which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued *ex parte*, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition.

of the right of circulating portraits ; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual ; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual ; and, if it does, what the nature and extent of such protection is.

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action. The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellow-men, — the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria*. Injury of feelings may indeed be taken account of in ascertaining the amount of damages when attending what is recognized as a legal injury ;¹

¹ Though the legal value of "feelings" is now generally recognized, distinctions have been drawn between the several classes of cases in which compensation may or may not be recovered. Thus, the fright occasioned by an assault constitutes a cause of action, but fright occasioned by negligence does not. So fright coupled with bodily injury affords a foundation for enhanced damages ; but, ordinarily, fright unattended by bodily injury cannot be relied upon as an element of damages, even where a valid cause of action exists, as in trespass *quare clausum fregit*. *Wyman v. Leavitt*, 71 Me. 227; *Canning v. Williamstown*, 1 Cush. 451. The allowance of damages for injury to the parents'

but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the "honor" of another.¹

It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.² Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular

feelings, in case of seduction, abduction of a child (*Stowe v. Heywood*, 7 All. 118), or removal of the corpse of child from a burial-ground (*Meagher v. Driscoll*, 99 Mass. 281), are said to be exceptions to a general rule. On the other hand, injury to feelings is a recognized element of damages in actions of slander and libel, and of malicious prosecution. These distinctions between the cases, where injury to feelings does and where it does not constitute a cause of action or legal element of damages, are not logical, but doubtless serve well as practical rules. It will, it is believed, be found, upon examination of the authorities, that wherever substantial mental suffering would be the natural and probable result of the act, there compensation for injury to feelings has been allowed, and that where no mental suffering would ordinarily result, or if resulting, would naturally be but trifling, and, being unaccompanied by visible signs of injury, would afford a wide scope for imaginative ills, there damages have been disallowed. The decisions on this subject illustrate well the subjection in our law of logic to common-sense.

¹ "Injuria, in the narrower sense, is every intentional and illegal violation of honour, *i.e.*, the whole personality of another." "Now an outrage is committed not only when a man shall be struck with the fist, say, or with a club, or even flogged, but also if abusive language has been used to one." Salkowski, *Roman Law*, p. 668 and p. 669, n. 2.

² "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." Yates, J., in *Millar v. Taylor*, 4 Burr. 2303, 2379 (1769).

method of expression adopted. It is immaterial whether it be by word¹ or by signs,² in painting,³ by sculpture, or in music.⁴ Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression.⁵ The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public.⁶ No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public,—in other words,

¹ *Nicols v. Pitman*, 26 Ch. D. 374 (1884).

² *Lee v. Simpson*, 3 C. B. 871, 881; *Daly v. Palmer*, 6 Blatchf. 256.

³ *Turner v. Robinson*, 10 Ir. Ch. 121; s. c. ib. 510.

⁴ *Drone on Copyright*, 102.

⁵ "Assuming the law to be so, what is its foundation in this respect? It is not, I conceive, referable to any consideration peculiarly literary. Those with whom our common law originated had not probably among their many merits that of being patrons of letters; but they knew the duty and necessity of protecting property, and with that general object laid down rules providently expansive,—rules capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce.

"The produce of mental labor, thoughts and sentiments, recorded and preserved by writing, became, as knowledge went onward and spread, and the culture of man's understanding advanced, a kind of property impossible to disregard, and the interference of modern legislation upon the subject, by the stat. 8 Anne, professing by its title to be 'For the encouragement of learning,' and using the words 'taken the liberty,' in the preamble, whether it operated in augmentation or diminution of the private rights of authors, having left them to some extent untouched, it was found that the common law, in providing for the protection of property, provided for their security, at least before general publication by the writer's consent." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 695 (1849).

⁶ "The question, however, does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 694.

publishes it.¹ It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all.² The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property;³ and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation

¹ *Duke of Queensberry v. Shebbeare*, 2 Eden, 329 (1758); *Bartlett v. Crittenden*, 5 McLean, 32, 41 (1849).

² *Drone on Copyright*, pp. 102, 104; *Parton v. Prang*, 3 Clifford, 537, 548 (1872); *Jefferys v. Boosey*, 4 H. L. C. 815, 867, 962 (1854).

³ "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of the friendship affords a reason for the interference of the court." Lord Eldon in *Gee v. Pritchard*, 2 Swanst. 402, 413 (1818).

"Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 695.

"It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question, whether upon any ground the plaintiff can be entitled to the relief which he claims, remains to be answered; and it appears to us that there is only one ground upon which his title to claim, and our jurisdiction to grant, the relief, can be placed. We must be satisfied, that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." Duer, J., in *Woolsey v. Judd*, 4 Duer, 379, 384 (1855).

of that term. A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of a list or even a description of them.¹ Yet in the famous case of

¹ "A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

"Suppose, however,—instead of a translation, an abridgment, or a review,—the case of a catalogue,—suppose a man to have composed a variety of literary works ('innocent,' to use Lord Eldon's expression), which he has never printed or published, or lost the right to prohibit from being published,—suppose a knowledge of them unduly obtained by some unscrupulous person, who prints with a view to circulation a descriptive catalogue, or even a mere list of the manuscripts, without authority or consent, does the law allow this? I hope and believe not. The same principles that prevent more candid piracy must, I conceive, govern such a case also.

"By publishing of a man that he has written to particular persons, or on particular subjects, he may be exposed, not merely to sarcasm, he may be ruined. There may be in his possession returned letters that he had written to former correspondents, with whom to have had relations, however harmlessly, may not in after life be a recommendation; or his writings may be otherwise of a kind squaring in no sort with his outward habits and worldly position. There are callings even now in which to be convicted of literature, is dangerous, though the danger is sometimes escaped.

"Again, the manuscripts may be those of a man on account of whose name alone a mere list would be matter of general curiosity. How many persons could be mentioned, a catalogue of whose unpublished writings would, during their lives or afterwards, command a ready sale!" Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 De Gex & Sm. 652, 693.

Prince Albert *v.* Strange, the court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise."¹ Likewise, an unpublished collection of news possessing no element of a literary nature is protected from piracy.²

That this protection cannot rest upon the right to literary or artistic property in any exact sense, appears the more clearly

¹ "A copy or impression of the etchings would only be a means of communicating knowledge and information of the original, and does not a list and description of the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases upon abridgments, translations, extracts, and criticisms of published works have no reference whatever to the present question; they all depend upon the extent of right under the acts respecting copyright, and have no analogy to the exclusive rights in the author of unpublished compositions which depend entirely upon the common-law right of property." Lord Cottenham in *Prince Albert v. Strange*, 1 McN. & G. 23, 43 (1849). "Mr. Justice Yates, in *Millar v. Taylor*, said, that an author's case was exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art, executed by a man for his own amusement, instruction, or use, is allowed to subsist, certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances."

"I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less, because it is an intrusion,—an unbecoming and unseemly intrusion,—an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man,—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life,—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 696, 697.

² *Kiernan v. Manhattan Quotation Co.*, 50 How. Pr. 194 (1876).

when the subject-matter for which protection is invoked is not even in the form of intellectual property, but has the attributes of ordinary tangible property. Suppose a man has a collection of gems or curiosities which he keeps private: it would hardly be contended that any person could publish a catalogue of them, and yet the articles enumerated are certainly not intellectual property in the legal sense, any more than a collection of stoves or of chairs.¹

The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that "letters not possessing the attributes of literary compositions are not property entitled to protection;" and that it was "evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author which he never would consent to have published."² But

¹ "The defendants' counsel say, that a man acquiring a knowledge of another's property without his consent is not by any rule or principle which a court of justice can apply (however secretly he may have kept or endeavored to keep it) forbidden without his consent to communicate and publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally, or in print or writing.

"I claim, however, leave to doubt whether, as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, it is certain that a person who, without the owner's consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property.

"It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be so circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings, or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial against him; nor would it be difficult to suggest other examples. . . .

"It was suggested that, to publish a catalogue of a collector's gems, coins, antiquities, or other such curiosities, for instance, without his consent, would be to make use of his property without his consent; and it is true, certainly, that a proceeding of that kind may not only as much embitter one collector's life as it would flatter another, — may be not only an ideal calamity, — but may do the owner damage in the most vulgar sense. Such catalogues, even when not descriptive, are often sought after, and sometimes obtain very substantial prices. These, therefore, and the like instances, are not necessarily examples merely of pain inflicted in point of sentiment or imagination; they may be that, and something else beside." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 689, 690.

² *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 324 (1848); *Wetmore v. Scovell*, 3 Edw. Ch. 515 (1842). See Sir Thomas Plumer in 2 Ves. & B. 19 (1813).

these decisions have not been followed,¹ and it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same, and, of course, also, wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine. Thus in the case of *Prince Albert v. Strange*, already referred to, the opinions both of the Vice-Chancellor and of the Lord Chancellor, on appeal, show a more or less clearly defined perception of a principle broader than those which were mainly discussed, and on which they both placed their chief reliance. Vice-Chancellor Knight Bruce referred to publishing of a man that he had "written to particular persons or on particular subjects" as an instance of possibly injurious disclosures as to private matters, that the courts would in a proper case prevent; yet it is difficult to perceive how, in such a case, any right of property, in the narrow sense, would be drawn in question, or why, if such a publication would be restrained when it threatened to expose the victim not merely to sarcasm, but to ruin, it should not equally be enjoined, if it threatened to embitter his life. To deprive a man of the potential profits to be realized by publishing a catalogue of his gems cannot *per se* be a wrong to him. The possibility of future profits is not a right of property which the law ordinarily recognizes; it must, therefore, be an infraction of other rights which constitutes the wrongful act, and that infraction is equally wrongful, whether its results are to forestall the profits that the individual himself might secure by giving the matter a publicity obnoxious to him, or to gain an advantage at the expense of his mental pain and suffering. If the fiction of property in a narrow sense must be preserved, it is still true that the end accomplished by the gossip-monger is attained by the use of that which

¹ *Woolsey v. Judd*, 4 Duer, 379, 404 (1855). "It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication." Sir Samuel Romilly, *arg.*, in *Gee v. Pritchard*, 2 Swanst. 402, 418 (1818). But see High on Injunctions, 3d ed., § 1012, *contra*.

is another's, the facts relating to his private life, which he has seen fit to keep private. Lord Cottenham stated that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his," and cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of *Wyatt v. Wilson*, in 1820, respecting an engraving of George the Third during his illness, to the effect that "if one of the late king's physicians had kept a diary of what he heard and saw, the court would not, in the king's lifetime, have permitted him to print and publish it;" and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that "privacy is the right invaded." But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting.

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed — and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.¹

¹ "But a doubt has been suggested, whether mere private letters, not intended as literary compositions, are entitled to the protection of an injunction in the same manner as compositions of a literary character. This doubt has probably arisen from the habit of not discriminating between the different rights of property which belong to an unpublished manuscript, and those which belong to a published book. The latter, as I have intimated in another connection, is a right to take the profits of publication. The former is a right to control the act of publication, and to decide whether there shall be any publication at all. It has been called a right of property; an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite. This expression can leave us in no doubt as to the meaning of the learned

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

It may be urged that a distinction should be taken between the

judges who have used it, when they have applied it to cases of unpublished manuscripts. They obviously intended to use it in no other sense, than in contradistinction to the mere interests of feeling, and to describe a substantial right of legal interest." Curtis on Copyright, pp. 93, 94.

The resemblance of the right to prevent publication of an unpublished manuscript to the well-recognized rights of personal immunity is found in the treatment of it in connection with the rights of creditors. The right to prevent such publication and the right of action for its infringement, like the cause of action for an assault, battery, defamation, or malicious prosecution, are not assets available to creditors.

"There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property." McLean, J., in *Bartlett v. Crittenden*, 5 McLean, 32, 37 (1849).

It has also been held that even where the sender's rights are not asserted, the receiver of a letter has not such property in it as passes to his executor or administrator as a salable asset. *Eyre v. Higbee*, 22 How. Pr. (N. Y.) 198 (1861).

"The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived — *proprius* — is 'one's own.'" Drone on Copyright, p. 6.

It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal.

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deliberate expression of thoughts and emotions in literary or artistic compositions and the casual and often involuntary expression given to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort.¹ This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now accorded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person, — the right to one's personality.

It should be stated that, in some instances where protection has been afforded against wrongful publication, the jurisdiction has been asserted, not on the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or confidence.

Thus, in *Abernethy v. Hutchinson*, 3 L. J. Ch. 209 (1825), where the plaintiff, a distinguished surgeon, sought to restrain the publication in the "Lancet" of unpublished lectures which he had delivered at St. Bartholomew's Hospital in London, Lord Eldon

¹ "Such then being, as I believe, the nature and the foundation of the common law as to manuscripts independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 696.

doubted whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground of breach of confidence, holding "that when persons were admitted as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish, for profit, that which they had not obtained the right of selling."

In *Prince Albert v. Strange*, 1 McN. & G. 25 (1849), Lord Cottenham, on appeal, while recognizing a right of property in the etchings which of itself would justify the issuance of the injunction, stated, after discussing the evidence, that he was bound to assume that the possession of the etchings by the defendant had "its foundation in a breach of trust, confidence, or contract," and that upon such ground also the plaintiff's title to the injunction was fully sustained.

In *Tuck v. Priest*, 19 Q. B. D. 639 (1887), the plaintiffs were owners of a picture, and employed the defendant to make a certain number of copies. He did so, and made also a number of other copies for himself, and offered them for sale in England at a lower price. Subsequently, the plaintiffs registered their copyright in the picture, and then brought suit for an injunction and damages. The Lords Justices differed as to the application of the copyright acts to the case, but held unanimously that independently of those acts, the plaintiffs were entitled to an injunction and damages for breach of contract.

In *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888), a photographer who had taken a lady's photograph under the ordinary circumstances was restrained from exhibiting it, and also from selling copies of it, on the ground that it was a breach of an implied term in the contract, and also that it was a breach of confidence. Mr. Justice North interjected in the argument of the plaintiff's counsel the inquiry: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" and counsel for the plaintiff answered: "In that case there would be no trust or consideration to support a contract." Later, the defendant's counsel argued that "a person has no property in his own features; short of doing what is libellous or otherwise illegal, there is no restriction on the

photographer's using his negative." But the court, while expressly finding a breach of contract and of trust sufficient to justify its interposition, still seems to have felt the necessity of resting the decision also upon a right of property,¹ in order to

¹ "The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say 'express or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that the photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only." Referring to the opinions delivered in *Tuck v. Priest*, 19 Q. B. D. 639, the learned justice continued: "Then Lord Justice Lindley says: 'I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.' That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself. The phrase 'a gross breach of faith' used by Lord Justice Lindley in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof." *North, J.*, in *Pollard v. Photographic Co.*, 40 Ch. D. 345, 349-352 (1888).

"It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of pro-

bring it within the line of those cases which were relied upon as precedents.¹

This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special

tection being due for the products of a man's own skill or mental labor; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 and 26 Vict., c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

"The result is that in the present case the copyright in the photograph is in one of the plaintiffs. It is true, no doubt, that sect. 4 of the same act provides that no proprietor of copyright shall be entitled to the benefit of the act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female plaintiff has not been registered that this act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the act cannot be enforced until after registration, this does not deprive the plaintiffs of their common-law right of action against the defendant for his breach of contract and breach of faith. This is quite clear from the cases of *Morison v. Moat* [9 Hare, 241] and *Tuck v. Priester* [19 Q. B. D. 629] already referred to, in which latter case the same act of Parliament was in question." Per North, J., *ibid.* p. 352.

This language suggests that the property right in photographs or portraits may be one created by statute, which would not exist in the absence of registration; but it is submitted that it must eventually be held here, as it has been in the similar cases, that the statute provision becomes applicable only when there is a publication, and that before the act of registering there is property in the thing upon which the statute is to operate.

¹ *Duke of Queensberry v. Shebbeare*, 2 Eden, 329; *Murray v. Heath*, 1 B. & Ad. 804; *Tuck v. Priester*, 19 Q. B. D. 629.

confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger; and so the theory of property in the contents of letters was adopted.¹ Indeed, it is difficult to conceive on what theory of the law the casual recipient of a letter, who proceeds to publish it, is guilty of a breach of contract, express or implied, or of any breach of trust, in the ordinary acceptation of that term. Suppose a letter has been addressed to him without his solicitation. He opens it, and reads. Surely, he has not made any contract; he has not accepted any trust. He cannot, by opening and reading

¹See Mr. Justice Story in *Folsom v. Marsh*, 2 Story, 100, 111 (1841):—

"If he [the recipient of a letter] attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. . . . The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. *A fortiori*, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion."

the letter, have come under any obligation save what the law declares; and, however expressed, that obligation is simply to observe the legal right of the sender, whatever it may be, and whether it be called his right of property in the contents of the letter, or his right to privacy.¹

A similar groping for the principle upon which a wrongful publication can be enjoined is found in the law of trade secrets. There, injunctions have generally been granted on the theory of a breach of contract, or of an abuse of confidence.² It would, of course, rarely happen that any one would be in the possession of a secret unless confidence had been reposed in him. But can it be supposed that the court would hesitate to grant relief against one who had obtained his knowledge by an ordinary trespass,—for instance, by wrongfully looking into a book in which the secret was recorded, or by eavesdropping? Indeed, in *Yovatt v. Winyard*, 1 J. & W. 394 (1820), where an injunction was granted against making any use of or communicating certain recipes for veterinary medicine, it appeared that the defendant, while in the plaintiff's employ, had surreptitiously got access to his book of recipes, and copied them. Lord Eldon "granted the injunction, upon the ground of there having been a breach of trust and confidence;" but it would seem to be difficult to draw any sound legal distinction between such a case and one where a mere stranger wrongfully obtained access to the book.³

¹ "The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to require the manuscript from the holder in order to a publication of himself." Per Hon. Joel Parker, quoted in *Grigsby v. Breckenridge*, 2 Bush. 480, 489 (1857).

² In *Morison v. Moat*, 9 Hare, 241, 255 (1851), a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V. C., said: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence,—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

³ A similar growth of the law showing the development of contractual rights into rights of property is found in the law of goodwill. There are indications, as early as the Year Books, of traders endeavoring to secure to themselves by contract the advantages now designated by the term "goodwill;" but it was not until 1743 that goodwill received

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.¹

If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one. If casual and unimportant state-

legal recognition as property apart from the personal covenants of the traders. See Allan on Goodwill, pp. 2; 3.

¹ The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.

But even the fact that a certain decision would involve judicial legislation should not be taken as conclusive against the propriety of making it. This power has been constantly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Austin's Jurisprudence, p. 224.

The cases referred to above show that the common law has for a century and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule.

ments in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.

The right to privacy, limited as such right must necessarily be, has already found expression in the law of France.¹

It remains to consider what are the limitations of this right to privacy, and what remedies may be granted for the enforcement of the right. To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel, and in the law of literary and artistic property.

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest.² There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law,—for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability. The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may

¹ Loi Relative à la Presse. 11 Mai 1868.

"11. Toute publication dans un écrit periodique relative à un fait de la vie privée constitue une contravention punie d'un amende de cinq cent francs.

"La poursuite ne pourra être exercée que sur la plainte de la partie intéressée."

Rivière, Codes Français et Lois Usuelles. App. Code Pen., p. 20.

² See *Campbell v. Spottiswoode*, 3 B. & S. 769, 776; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Gott v. Pulsifer*, 122 Mass. 235.

properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed *per se*. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.¹ Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, — a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to

¹ "Nos mœurs n'admettent pas la prétention d'enlever aux investigations de la publicité les actes qui relèvent de la vie publique, et ce dernier mot ne doit pas être restreint à la vie officielle ou à celle du fonctionnaire. Tout homme qui appelle sur lui l'attention ou les regards du public, soit par une mission qu'il a reçue ou qu'il se donne, soit par le rôle qu'il s'attribue dans l'industrie, les arts, le théâtre, etc., ne peut plus invoquer contre la critique ou l'exposé de sa conduite d'autre protection que les lois qui repriment la diffamation et l'injure." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.¹

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies; in municipal assemblies, or the committees of such assemblies, or practically by any communication made in any other public body, municipal or parochial, or in any body quasi public, like the large voluntary associations formed

¹ "Celui-la seul a droit au silence absolu qui n'a pas expressément ou indirectement provoqué ou autorisé l'attention, l'approbation ou le blâme." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

The principle thus expressed evidently is designed to exclude the wholesale investigations into the past of prominent public men with which the American public is too familiar, and also, unhappily, too well pleased; while not entitled to the "*silence absolu*" which less prominent men may claim as their due, they may still demand that all the details of private life in its most limited sense shall not be laid bare for inspection.

for almost every purpose of benevolence, business, or other general interest; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege.¹ Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs, in matters where his own interest is concerned.²

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel.³ The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.⁴

¹ *Wason v. Walters*, L. R. 4 Q. B. 73; *Smith v. Higgins*, 16 Gray, 251; *Barrows v. Bell*, 7 Gray, 331.

² This limitation upon the right to prevent the publication of private letters was recognized early: —

“But, consistently with this right [of the writer of letters], the persons to whom they are addressed may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach.” *Story, J.*, in *Folsom v. Marsh*, 2 Story, 100, 110, 111 (1841).

The existence of any right in the recipient of letters to publish the same has been strenuously denied by Mr. Drone; but the reasoning upon which his denial rests does not seem satisfactory. *Drone on Copyright*, pp. 136-139.

³ *Townshend on Slander and Libel*, 4th ed., § 18; *Odgers on Libel and Slander*, 2d ed., p. 3.

⁴ “But as long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain and mortification of knowing that he was gossiped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack upon his reputation. His peace and comfort were, therefore, but slightly affected by it.” *E. L. Godkin*, “The Rights of the Citizen: To his Reputation.” *Scribner's Magazine*, July, 1890, p. 66.

Vice-Chancellor Knight Bruce suggested in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 694, that a distinction would be made as to the right to privacy of works of art between an oral and a written description or catalogue.

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided establish also what should be deemed a publication, — the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law.¹

5. The truth of the matter published does not afford a defence. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.²

6. The absence of "malice" in the publisher does not afford a defence.

Personal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property. Such malice is never necessary to be shown in an action for libel or slander at common law, except in rebuttal of some defence, *e. g.*, that the occasion rendered the communication privileged, or, under the statutes in this State and elsewhere, that the statement complained of was true. The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent; and viewed as a wrong

¹ See Drone on Copyright, pp. 121, 289, 290.

² Compare the French law.

"En prohibant l'envahissement de la vie privée, sans qu'il soit nécessaire d'établir l'intention criminelle, la loi a entendue interdire toute discussion de la part de la défense sur la vérité des faits. Le remède eut été pire que le mal, si un débat avait pu s'engager sur ce terrain." *Circ. Mins. Just.*, 4 Juin, 1868. *Rivière Code Français et Lois Usuelles*, App. Code Penn. 20 n(a).

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to society, it is the same principle adopted in a large category of statutory offences.

The remedies for an invasion of the right of privacy are also suggested by those administered in the law of defamation, and in the law of literary and artistic property, namely :—

1. An action of tort for damages in all cases.¹ Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

2. An injunction, in perhaps a very limited class of cases.²

It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required.³ Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits ; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of

¹ Comp. Drone on Copyright, p. 107.

² Comp. High on Injunctions, 3d ed., § 1015; Townshend on Libel and Slander, 4th ed., §§ 417a-417d.

³ The following draft of a bill has been prepared by William H. Dunbar, Esq., of the Boston bar, as a suggestion for possible legislation :—

"SECTION 1. Whoever publishes in any newspaper, journal, magazine or other periodical publication any statement concerning the private life or affairs of another, after being requested in writing by such other person not to publish such statement or any statement concerning him, shall be punished by imprisonment in the State prison not exceeding five years, or by imprisonment in the jail not exceeding two years, or by fine not exceeding one thousand dollars; provided, that no statement concerning the conduct of any person in, or the qualifications of any person for, a public office or position which such person holds, has held, or is seeking to obtain, or for which such person is at the time of such publication a candidate, or for which he or she is then suggested as a candidate, and no statement of or concerning the acts of any person in his or her business, profession, or calling, and no statement concerning any person in relation to a position, profession, business, or calling, bringing such person prominently before the public, or in relation to the qualifications for such a position, business, profession, or calling of any person prominent or seeking prominence before the public, and no statement relating to any act done by any person in a public place, nor any other statement of matter which is of public and general interest, shall be deemed a statement concerning the private life or affairs of such person within the meaning of this act.

"SECT. 2. It shall not be a defence to any criminal prosecution brought under section 1 of this act that the statement complained of is true, or that such statement was published without a malicious intention; but no person shall be liable to punishment for any statement published under such circumstances that if it were defamatory the publication thereof would be privileged."

the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

Samuel D. Warren,
Louis D. Brandeis.

BOSTON, December, 1890.

INTANGIBLE PROPERTY: PRIVACY, POWER, AND INFORMATION CONTROL

Adam D. Moore

Imagine a place where trespassers leave no footprints, where goods can be stolen an infinite number of times and yet remain in the possession of their original owners, where businesses you never heard of can own the history of your personal affairs, where only children feel fully at home, where the physics is psychology, and where everyone is as virtual as the shadows in Plato's cave. (John Perry Barlow, "Coming Into the Country")

INTRODUCTION

It is an obvious truism that the proliferation of computer networks and the digitization of everything not obstinately physical² is radically changing the human experience. As more individuals obtain access to computer networks such as the Internet or the World Wide Web—the official word for this is to become “wired”—digital based environments and information have come to play a central role in our everyday lives. Our money is stored and transmitted digitally, we listen to CDs where the music is recorded and played digitally, there are now digital cell-phones, cable television, and musical instruments. And all of this lies outside of the bit streams of 1's and 0's that make up computer networks, software programs, and operating systems. Many claim that the future holds information that cascades, not just through a PC, but across all forms of

communication devices—headlines that flash across your watch, or a traffic map popping up on a cellular phone. It means content that will not hesitate to find you—whether you have clicked on something or not.³ The integration, by digital technology, of what used to be disparate forms of communication is radically changing how we work and play.

At the center of this communication revolution is the control of information—who has it, how can it be gathered, can databases be owned, should information be “pulled” by users as a request or “pushed” to users who have shown interest? These concerns have obvious import into the areas of privacy and power. We each leave “digital footprints” that can be tracked by data mining companies and used to create purchasing profiles, medical summaries, political agendas, and the like. Moreover, this information is then sold to direct marketing companies—who will then call, write, or in the future, e-mail us—government agencies, private investigators, or to anyone for any reason. There used to be domains of a person's life that were totally inaccessible. A person's home and bedroom, notebook and hard drive, were all sanctuaries against the prying eyes and ears of others. It is alarming that digital technology is sweeping these domains away. Deborah Johnson accurately captures this sentiment.

We have the technological capacity for the kind of massive, continuous surveillance of individuals that was envisioned in such frightening early twentieth-century science fiction works as George Orwell's *1984* and Zamyatin's *We*. The only difference between what is now possible and what was envisioned then are that much of the surveillance of individuals that is now done is by private institutions (marketing firms, insurance companies, credit agencies), and much of the surveillance now is via electronic records instead of by direct human observation or through cameras.⁴

The power of having such information should be obvious. Companies will be able to (and are able to) directly contact individuals who have shown interest in their products, or similar products, or their rival's products. And there are even more insidious uses for such information. Imagine a child custody case where one of the parents claims that the other is an unfit custodian for the children because the accused parent frequently views pornographic videos. Think of how governments could use such information to control populations or political opponents, or how insurance companies could use such information. In controlling information, especially sensitive personal information, the stakes could not be higher.

What follows is an explication and defense of a Lockean model of intangible property.⁵ My goal is not to defend this model against all comers—rather, I will begin with weak and, hopefully, widely shared assumptions, sketch a theory based on these assumptions, and then proceed to the more meaningful task of analyzing a number of issues related to information control. Simply put, I will argue that individuals can own information about themselves and others. Moreover, I will make a case for limiting what can be done with intangible property based, in part, on privacy rights.

Before continuing, I would like to note a few important differences between intangible property and tangible or physical property. The domain of intangible property includes that of intellectual property—the subject matter of copyrights and patents (books, movies, computer programs, processes of manufacture, etc.)—as well as personal information, reputation, lists of facts, and the like. Intangible property is generally characterized as non-physical property where owner's rights surround control of physical manifestations or tokens of some abstract idea or type. Ideas or collections of ideas are readily understood in terms of non-physical types, while the physical manifestations of ideas can be modeled in terms of tokens. Intangible property rights surround control of physical tokens, and this control protects rights to types or abstract ideas.⁶

Intangible works, unlike tangible goods, are non-rivalrous. Computer programs, books, movies, and lists of customers can all be used and consumed by many individuals concurrently.⁷ This is not the case for cars, computers, VCRs, and most other tangible goods. Intangible property, unlike physical property, is also non-zero-sum. In the clearest case, when I eat an apple there is one less apple for everyone else—my plus one and everyone else's minus one sum to zero. With intangible property it is not as if my acquisition leaves one less for everyone else.

Another difference between physical and intangible property concerns what is available for acquisition. While matter, owned or unowned, already exists the same is not true of all intangible works. What is available for acquisition in terms of intangible property can be split into three domains. There is the domain of ideas yet to be discovered (new scientific laws, mapping the human genome, etc.), the domain of ideas

yet to be created (the next *Lord of the Rings*, *Star Wars*, etc.), and the domain of intangible works that are privately owned. Since it is possible for individuals to independently invent or create the same intangible work and obtain rights, we must include currently owned intangible works as available for acquisition.⁸ Only the set of ideas that are in the public domain or those ideas that are a part of the common culture are not available for acquisition and exclusion. I take this latter set to be akin to a public park.

A LOCKEAN MODEL OF INTANGIBLE PROPERTY⁹

We may begin by asking how property rights to unowned objects are generated. This is known as the problem of original acquisition and a common response is given by John Locke. "For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is *enough and as good left for others*."¹⁰ So long as the proviso that "enough and as good" is satisfied, an acquisition is of prejudice to no one. Locke argues that "Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same left him to quench his thirst."¹¹ While the proviso is generally interpreted as a necessary condition for legitimate acquisition, I would like to examine it as a sufficient condition.¹² If the appropriation of an unowned object leaves enough and as good for others, then the acquisition is justified.

Suppose that mixing one's labor with an unowned object creates a prima facie claim against others not to interfere that can only be overridden by a comparable claim. The role of the proviso is to provide one possible set of conditions where the prima

facie claim remains undefeated.¹³ Another way of stating this position is that the proviso in addition to X, where X is labor or first occupancy or some other weak claim generating activity, provides a sufficient condition for original appropriation.

Justification for the view that labor or possession may generate prima facie claims against others could proceed along several lines. First, labor, intellectual effort, and creation are generally voluntary activities that can be unpleasant, exhilarating, and everything in between. That we voluntarily do these things as sovereign moral agents may be enough to warrant non-interference claims against others.¹⁴ A second, and possibly related justification, is based on desert. Sometimes individuals who voluntarily do or fail to do certain things deserve some outcome or other. Thus, students may deserve high honor grades and criminals may deserve punishment. When notions of desert are evoked claims and obligations are made against others—these non-absolute claims and obligations are generated by what individuals do or fail to do. Thus in fairly uncontroversial cases of desert, we are willing to acknowledge that weak claims are generated and if desert can properly attach to labor or creation, then claims may be generated in these cases as well.

Finally, a justification for the view that labor or possession may generate prima facie claims against others could be grounded in respect for individual autonomy and sovereignty. As sovereign and autonomous agents, especially within the liberal tradition, we are afforded the moral and legal space to order our lives as we see fit. As long as respect for others is maintained we are each free to set the course and direction of our own lives, to choose between various lifelong goals and projects, and to develop our capacities and

talents accordingly. Simple respect for individuals would prohibit wresting from their hands an unowned object that they acquired or produced. I hasten to add that at this point we are trying to justify weak non-interference claims, not full-blown property rights. Other things being equal, when an individual labors to create an intangible work, then weak presumptive claims of non-interference have been generated on grounds of labor, desert, or autonomy.

As noted before, the role of the proviso is to stipulate one possible set of conditions where the *prima facie* claim remains undefeated. Suppose Fred appropriates a grain of sand from an endless beach and paints a lovely, albeit small, picture on the surface. Ginger, who has excellent eyesight, likes Fred's grain of sand and snatches it away from him. On this interpretation of Locke's theory, Ginger has violated Fred's weak presumptive claim to the grain of sand. We may ask, what legitimate reason could Ginger have for taking Fred's grain of sand rather than picking up her own grain of sand? If Ginger has no comparable claim, then Fred's *prima facie* claim remains undefeated. An undefeated *prima facie* claim can be understood as a right.¹⁵

A Pareto-Based Proviso

The underlying rationale of Locke's proviso is that if no one's situation is worsened, then no one can complain about another individual appropriating part of the commons. Put another way, an objection to appropriation, which is a unilateral changing of the moral landscape, would focus on the impact of the appropriation on others. But if this unilateral changing of the moral landscape makes no one worse off, there is no room for rational criticism. The proviso permits individuals to better themselves so long as no one is worsened (weak Pareto-superiority). The base level intuition of a

Pareto improvement is what lies behind the notion of the proviso.¹⁶ If no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted. In fact, it is precisely because no one is harmed that it seems unreasonable to object to a Pareto-superior move. Thus, the proviso can be understood as a version of a "no harm, no foul" principle.¹⁷

Before continuing, I will briefly consider the plausibility of a Pareto-based proviso as a moral principle. First, to adopt a less-than-weak Pareto principle would permit individuals, in bettering themselves, to worsen others. Such provisos on acquisition are troubling because at worst they may open the door to predatory activity and at best they give anti-property theorists the ammunition to combat the weak presumptive claims that labor and possession may generate. Part of the intuitive force of a Pareto-based proviso is that it provides little or no grounds for rational complaint. Moreover, if we can justify intangible property rights with a more stringent principle, a principle that is harder to satisfy, then we have done something more robust, and perhaps more difficult to attack, when we reach the desired result.

To require individuals, in bettering themselves, to better others is to require them to give others free rides. In the absence of social interaction, what reason can be given for forcing one person, if she is to benefit herself, to benefit others?¹⁸ If, absent social interaction, no benefit is required then why is such benefit required within society? The crucial distinction that underlies this position is between worsening someone's situation and failing to better it¹⁹ and I take this intuition to be central to a kind of deep moral individualism.²⁰ Moreover, the intuition that grounds a Pareto-based proviso fits well with the view that labor and possibly the mere possession of unowned objects

creates a *prima facie* claim to those objects. Individuals are worthy of a deep moral respect and this grounds a liberty to use and possess unowned objects.

Bettering, Worsening, and the Baseline Problem

Assuming a just initial position²¹ and that Pareto-superior moves are legitimate, there are two questions to consider when examining a Pareto-based proviso. First, what are the terms of being worsened? This is a question of scale, measurement, or value. An individual could be worsened in terms of subjective preference satisfaction, wealth, happiness, freedoms, opportunities, et cetera. Which of these count in determining bettering and worsening? Second, once the terms of being worsened have been resolved, which two situations are we going to compare to determine if someone has been worsened? Is the question one of how others are now, after my appropriation, compared to how they would have been were I absent, or if I had not appropriated, or some other state? Here we are trying to answer the question "Worsened relevant to what?" This is known as the baseline problem.

In principle, the Lockean theory of intangible property being developed is consistent with a wide range of value theories.²² So long as the preferred value theory has the resources to determine bettering and worsening with reference to acquisitions, then Pareto-superior moves can be made and acquisitions justified on Lockean grounds. For now, assume an Aristotelian eudaimonist account of value exhibited by the following theses is correct.

1. Human well-being or flourishing is the sole standard of intrinsic value.
2. Human persons are rational project pursuers, and well-being or flourishing is attained through the setting, pursuing,

and completion of life goals and projects.²³

3. The control of physical and intangible objects is valuable. At a specific time each individual has a certain set of things she can freely use and other things she owns, but she also has certain opportunities to use and appropriate things. This complex set of opportunities along with what she can now freely use or has rights over constitutes her position materially—this set constitutes her level of material well-being.

While it is certainly the case that there is more to bettering and worsening than an individual's level of material well-being including opportunity costs, I will not pursue this matter further at present. Needless to say, a full-blown account of value will explicate all the ways in which individuals can be bettered and worsened with reference to acquisition. Moreover, as noted before, it is not crucial to the Lockean model being presented to defend some preferred theory of value against all comers. Whatever value theory that is ultimately correct, if it has the ability to determine bettering and worsening with reference to acquisitions, then Pareto-superior moves can be made and acquisitions justified on Lockean grounds.

The Baseline of Comparison

Lockeans as well as others who seek to ground rights to property in the proviso generally set the baseline of comparison as the state of nature. The commons or the state of nature is characterized as that state where the moral landscape has yet to be changed by formal property relations. Indeed, it would be odd to assume that individuals come into the world with complex property relations already intact with the universe. *Prima facie*, the assumption that the world is initially devoid of such

property relations seems much more plausible.²⁴ The moral landscape is barren of such relations until some process occurs—and it is not assumed that the process for changing the moral landscape the Lockean would advocate is the only justified means to this end.²⁵

For now, assume a state-of-nature situation where no injustice has occurred and where there are no property relations in terms of use, possession, or rights. All anyone has in this initial state are opportunities to increase her material standing. Suppose Fred creates an intangible work and does not worsen his fellows—alas, all they had were contingent opportunities and Fred's creation and exclusion adequately benefits them in other ways. After the acquisition, Fred's level of material well-being has changed. Now he has a possession that he holds legitimately, as well as all of his previous opportunities. Along comes Ginger who creates her own intangible work and considers whether her exclusion of it will worsen Fred. But what two situations should Ginger compare? Should the acquisitive case (Ginger's acquisition) be compared to Fred's initial state, where he had not yet legitimately acquired anything, or to his situation immediately before Ginger's taking? If bettering and worsening are to be cashed out in terms of an individual's level of well-being with opportunity costs and this measure changes over time, then the baseline of comparison must also change. In the current case we compare Fred's level of material well-being when Ginger possesses and excludes an intangible work to his level of well-being immediately before Ginger's acquisition.

The result of this discussion of bettering, worsening, and the baseline problem is the following proviso on original acquisition:²⁶

If the acquisition of an intangible work makes no one worse-off in terms of her level

of well-being (including opportunity costs) compared to how she was immediately before the acquisition, then the taking is permitted.

If correct, this account justifies rights to control intangible property. When an individual creates or compiles an intangible work and fixes it in some fashion, then labor and possession create a *prima facie* claim to the work. Moreover, if the proviso is satisfied the *prima facie* claim remains undefeated and rights are generated.

Suppose Ginger, who is living off of the commons, creates a new gathering technique that allows her to live better with less work. The set of ideas that she has created can be understood as an intangible work. Given that Ginger has labored to create this new gathering technique, it has been argued that she has a weak presumptive claim to the work. Moreover, it looks as if the proviso has been satisfied given that her fellows are left, all things considered, unaffected by her acquisition. This is to say that they are free to create, through their own intellectual efforts, a more efficient gathering system, or even one that is exactly the same as Ginger's.

Overall, the structure of the argument that I have given is:

1. If the acquisition of an intangible work satisfies a Paretian-based proviso, then the acquisition and exclusion are justified.
2. Some acts of intangible property creation and possession satisfy a Paretian-based proviso.
3. So, some intangible property rights are justified.

Support for the first premise can be summarized in three related points: 1a) *The Paretian Intuition*—if no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted.

This “no harm no foul” principle leaves little room for rational complaint; 1b) A less-weak Pareto principle would allow predation and a stronger-than-weak Pareto principle would allow parasitism; and 1c) A Pareto-based proviso is consistent with the view that individuals are worthy of a deep moral respect, that their lives and lifelong goals and projects are not justifiably sacrificed for incremental gains in social utility.

Support for the second premise can be summarized as follows: 2a) Intangible property is non-rivalrous—it is capable of being used and possessed by many individuals concurrently; 2b) The “same” intangible work may be created and owned by many different individuals concurrently (zero-sum); 2c) The number of ideas, collections of ideas, or intangible works available for appropriation is practically infinite (this makes the acquisition of intangible similar to Locke’s water drinker example); 2d) Institutions or systems of intangible property may provide compensation for apparent worsenings that occur at the level of acts;²⁷ and 2e) Many creations and inventions are strongly Pareto-superior—meaning that everyone is bettered and no one is worsened.

PROPERTY, PRIVACY, AND INFORMATION CONTROL

Although I have made a case for granting intangible property rights to individuals who satisfy the Paretian test this does not mean that owners can do anything they want with their property. To take a simple example, my property right in a Louisville slugger does not allow me swing it at your knees, nor can I throw it at your car. Property rights are generally limited by the rights of others. More specifically, there is a prohibition of harm with respect to property rights.²⁸ This means that you can do what you want with your property short of

unjustly harming others. Furthermore, this restriction—call it the harm restriction—fits well with the Lockean model under consideration. The proviso, a no harm no foul rule, allows individuals to acquire unowned goods. The harm restriction limits its harmful uses of those goods.

A second constraint has to do with privacy and information control. Privacy may be understood as that state where others do not have access to you or to information about you. I hasten to note that there are degrees of privacy. There are our own private thoughts that are never disclosed to anyone, as well as information we share with loved ones. Furthermore, there is information that we share with mere acquaintances and the general public. These privacy relations with others can be pictured “in terms of a series of ‘zones’ or ‘regions’ . . . leading to a ‘core self.’”²⁹ Thus, secrets shared with a loved one can still be considered private, even though they have been disclosed.

In an important article dealing with privacy, morality, and the law, William Parent offers the following definition for privacy.

Privacy is the condition of not having undocumented personal knowledge about one possessed by others. A person’s privacy is diminished exactly to the degree that others possess this kind of knowledge about him. Documented information is information that is found in the public record or is publicly available (e.g. information found in newspapers, court proceedings, and other official documents open to public inspection).³⁰

The problem with this definition is that it leaves the notion of privacy dependent upon what a society or culture takes as documentation and what information is available via the public record. Parent acts as if undocumented information is private while documented information is not, and this is the end of the matter. But surely the secret shared between lovers is private in

one sense and not in another. To take another case, consider someone walking in a public park. There is almost no limit to the kinds of information that can be acquired from this public display. One's image, height, weight, eye color, approximate age, and general physical abilities are all readily available. Moreover, biological matter will also be left in the public domain—strands of hair and the like may be left behind. Since this matter, and the information contained within, is publicly available it would seem that all of one's genetic profile is not private information.

Furthermore, what is publicly available information is dependent upon technology. Telescopes, listening devices, heat imaging sensors, and the like, open up what most would consider private domains for public consumption. What we are worried about is what should be considered a "private affair"—something that is no one else's business. Parent's conception of privacy is not sensitive to these concerns.

A right to privacy can be understood as a right to maintain a certain level of control over the inner spheres of personal information. It is a right to limit public access to the "core self"—personal information that one never discloses—and to information that one discloses only to family and friends. For example, suppose that I wear a glove because I am ashamed of a scar on my hand. If you were to snatch the glove away you would not only be violating my right to property—alas, the glove is mine to control—you would also violate my right to privacy; a right to restrict access to information about the scar on my hand. Similarly, if you were to focus your x-ray camera on my hand, take a picture of the scar through the glove, and then publish the photograph widely, you would violate a right to privacy.

Legal scholar William Prosser separated privacy cases into four distinct but related torts.³¹

Intrusion: Intruding (physically or otherwise) upon the solitude of another in a highly offensive manner. For example, a woman sick in the hospital with a rare disease refuses a reporter's request for a photograph and interview. The reporter photographs her anyway, over her objection.

Private facts: Publicizing highly offensive private information about someone which is not of legitimate concern to the public. For example, photographs of an undistinguished and wholly private hardware merchant carrying on an adulterous affair in a hotel room are published in a magazine.

False light: Publicizing a highly offensive and false impression of another. For example, a taxi driver's photograph is used to illustrate a newspaper article on cabdrivers who cheat the public when the driver in the photo is not, in fact, a cheat.

Appropriation: Using another's name or likeness for some advantage without the other's consent. For example, a photograph of a famous actress is used without her consent to advertise a product.

What binds these seemingly disparate cases under the heading "privacy invasions" is that they each concern personal information control. And while there may be other morally objectionable facets to these cases—for example, the taxi driver case may also be objectionable on grounds of defamation—there is arguably privacy interests at stake as well.

Having said something about what a right to privacy is we may ask how such rights are justified. A promising line of argument combines notions of autonomy and respect for persons. A central and guiding principle of western liberal democracies is that individuals, within certain limits, may set and

pursue their own life goals and projects. Rights to privacy erect a moral boundary that allows individuals the moral space to order their lives as they see fit. Clinton Rossiter puts the point succinctly.

Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of the modern society. . . . It seeks to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts.³²

Privacy protects us from the prying eyes and ears of governments, corporations, and neighbors. Within the walls of privacy we may experiment with new ways of living that may not be accepted by the majority. Privacy, autonomy, and sovereignty, it would seem come bundled together.

A second but related line of argument rests on the claim that privacy rights stand as a bulwark against governmental oppression and totalitarian regimes. If individuals have rights to control personal information and to limit access to themselves, within certain constraints, then the kinds of oppression that we have witnessed in the twentieth century would be near impossible. Put another way, if oppressive regimes are to consolidate and maintain power, then privacy rights (broadly defined) must be eliminated or severely restricted. If correct, privacy rights would be a core value that limited the forces of oppression.³³

Arguably any plausible account of human well-being or flourishing will have as a component a strong right to privacy. Controlling who has access to ourselves is an

essential part of being a happy and free person. This may be why "peeping Toms" and rapists are held up as moral monsters—they cross a boundary that should never be crossed without consent.

Surely each of us has the right to control our own thoughts, hopes, feelings, and plans, as well as a right to restrict access to information about our lives, family, and friends. I would argue that what grounds these sentiments is a right to privacy—a right to maintain a certain level of control over personal information.³⁴ While complete control of all our personal information is a pipe dream for many of us, simply because the information is already out there and most likely cannot or will not be destroyed, this does not detract from the view of personal information ownership. Through our daily activities we each create and leave digital footprints that others may follow and exploit—and that we do these things does not obviously sanction the gathering and subsequent disclosure of such information by others.

Whatever kind of information we are considering there is a gathering point that individuals have control over. For example, in purchasing a new car and filling out the car loan application, no one would deny we each have the right to demand that such information not be sold to other companies. I would argue that this is true for any disclosed personal information whether it be patient questionnaire information, video rental records, voting information, or credit applications. In agreeing with this view, one first has to agree that individuals have the right to control their own personal information—i.e., binding agreements about controlling information presuppose that one of the parties has the right to control this information.

Having said all of this, I would like to test the Lockean model of intangible property

with a very tricky case dealing with personal information control.

A woman is kidnapped, taken to an apartment, stripped, and terrorized. The police—and the media—surround the apartment. The police eventually overcome the kidnapper and rush the woman, who clutches a dish towel in a futile attempt to conceal her nudity, to safety. A photograph of her escape is published in the next day's newspaper. She sued for invasion of privacy and eventually lost the case. (*Cape Publications, Inc. v. Bridges*, Florida 1982)³⁵

According to the theory that I have sketched, the photographer may indeed have a property right to the photograph he took—if his mere acquisition does not worsen—but this does not mean that he can do anything with the photograph. His rights to control the picture are limited by the harm and privacy restrictions. So even if publishing the photograph did not harm the woman involved, it would still be an illicit violation of privacy.

Now, it is clear that my view runs counter to prevailing attitudes about the First Amendment. I would place more restrictions on speech or expression than is currently found in the law. Not only can we not yell "fire" in a crowded theater—this would violate the harm restriction—we cannot publish sensitive personal information without permission. This is not to say that the harm restriction and the privacy restriction are exceptionless—those who live their lives in the public realm may have to endure a more limited sphere of privacy. Moreover, certain harms may be permitted in order to protect a community from criminals and the like—for example, consider laws that require public notification when a child predator is relocated to a new community. Politicians and entertainers, in a sense, sanction a more limited sphere of privacy by choosing a certain career path

and a similar point can be made with respect to criminals. While the sphere of privacy protection may be more limited in these cases there are still boundaries that cannot be crossed. Becoming a "public figure" does not sanction continual harassment for autographs, pictures, and interviews. Access, in many ways, is still left to the individual—and this is how it should be.

On my view, an important part of a right to privacy is the right to control personal information; "control" in the sense of deciding who has access and to what uses the information can be put; "personal" in the sense of being about some individual as opposed to being about inanimate objects, corporations, institutions, and the like. These are not intended to be precise definitions—rather I am trying to capture the common everyday notion of a privacy interest. The appropriateness of who knows particular facts about an individual is, in an important sense, dependent on certain relationships. The kind of information access between doctor and patient, husband and wife, mother and child, and total strangers, are all appropriately different.³⁶

Against this backdrop what sense can be made of the public's "right to know"? A newspaper may publish information about a kidnapping and rescue, but this does not sanction publishing sensitive personal information about the victim. Right-to-know arguments may carry some weight in cases where public funds are being spent or when a politician reverses his stand on a particular issue, but they seem to be suspect when used to justify intrusions. Sissela Bok echoes these concerns when she writes,

Taken by itself, the notion that the public has a "right to know" is as quixotic from an epistemological as from a moral point of view, and the idea of the public's "right to know the truth" even more so. It would be hard to find a more fitting analogue to Jeremy

Bentham's characterization of talk about natural and imprescriptible rights as "rhetorical nonsense—nonsense upon stilts." How can one lay claim to a right to know the truth when even partial knowledge is out of reach concerning most human affairs, and when bias and rationalization and denial skew and limit knowledge still further?

So patently inadequate is the rationale of the public's right to know as a justification for reporters to probe and expose, that although some still intone it ritualistically at the slightest provocation, most now refer to it with a tired irony.³⁷

The social and cultural benefits of free speech and free information is generally cited as justification for a free press and the public's right to know. This is why news services can publish photographs and stories that contain sensitive personal information about almost anyone. But computer technology has changed the playing field and such arguments seem to lose force when compared to the overwhelming loss of privacy that we now face. The kinds of continual and systematic invasions by news services, corporations, data mining companies, and other individuals that will be possible in a few short years is quite alarming.

CONCLUSION

While there is still much to be worked out, I think that important steps have been taken toward a Lockean theory of intangible property. If no one is worsened by an acquisition, then there seems to be little room for rational complaint. The individual who takes a good long drink from a river does as much as to take nothing at all and the same may said of those who acquire intangible property. Given allowances for independent creation and that the frontier of intangible property is practically

infinite, the case for Locke's water-drinker and the author or inventor are quite alike.

Even so, such rights are not without limitations. I cannot justifiably slash your tires with my knife nor may I publish your medical records on my web site. The proliferation of the Internet and the World Wide Web into everyday life is forcing us to rethink our views about information access and control. The claim is not that controlling information used to be unimportant and now it is important—alas, censorship in various forms has always been with us. What I think true, however, is that computer networks coupled with digitally stored information is significantly changing the way we interact and communicate. We will have to be much more careful about what we do and say in the future both publicly and privately. Any information or ideas that we disclose, including inventions, recipes, or sensitive personal information, might soon be bouncing around cyberspace for anyone to access. Many net anarchists claim that "information want to be free" and advocate a model of unrestricted access to all kinds of information. In this article I have argued otherwise—information, especially sensitive personal information, can be owned and restricted on grounds of property or privacy. And if we are to err on the side of too much access or too much privacy, better—far better—the latter.

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Received June 16, 1998

NOTES

Portions of this paper were presented at the 1997 Central Division Meeting of the APA and at the 1998 Ohio Philosophical Association conference. I would like to thank David Wasserman, Jim Swindler, Earl Spurgin, Don Hubin, and Ken Itzkowitz for their suggestions and comments.

1. John Perry Barlow, "Coming Into the Country," *Communications of the ACM* 34 (March, 1991), 19.
2. This phrase comes from John Perry Barlow, "The Economy of Ideas: Everything You Know About Intellectual Property is Wrong," in *Intellectual Property: Moral, Legal, and International Dilemmas*, edited by A. Moore (Lanham, Md.: Rowman & Littlefield, 1997), Chapter 15.
3. Kevin Kelly and Gary Wolf, "Push," *Wired Magazine* (March 1997), 14.
4. Deborah Johnson, *Computer Ethics* (Upper Saddle River, N.J.: Prentice-Hall, 1994), 84.
5. For a lengthy defense of the following Lockean model see A. Moore, "A Lockean Theory of Intellectual Property," *The Hamline Law Review* 21 (Fall 1997): 65–108, and A. Moore, "Toward A Lockean Theory of Intellectual Property," in *Intellectual Property: Moral, Legal, and International Dilemmas*, edited by A. Moore (Lanham, Md.: Rowman & Littlefield, 1997), Chapter 5.
6. American copyright law prohibits the ownership of abstract ideas—copyright protects new and original expressions, not the ideas that stand behind the expressions. Nevertheless, there is still a type/token model here because copyrights protect expressions of a certain type.
7. It may be objected that some intangible works are rivalrous, for example the Mona Lisa or Michaelangelo's David. What is rivalrous about these works is not the ideas that are embodied in the canvas or stone; it is the physical works themselves. We can all hang a copy of the Mona Lisa in our living rooms—we just can't have the original embodiment.
8. Unlike copyrights and trade secrets, patents exclude other independent inventors from obtaining rights to a work already patented. The Lockean model of intangible property that I will sketch does include such a rule.
9. A more detailed discussion of the issues taken up in this section are addressed in earlier works. See Moore, "A Lockean Theory of Intellectual Property," 65–108, and "Toward A Lockean Theory of Intellectual Property," Chapter 5.
10. John Locke, *The Second Treatise of Government*, § 27 (italics mine).
11. Locke, *Second Treatise*, § 33.
12. Both Jeremy Waldron ("Enough and as Good Left for Others," *Philosophical Quarterly* [1979]: 319–328) and Clark Wolf ("Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generation," *Ethics* [July, 1995]: 791–818) maintain that Locke thought of the proviso as a sufficient condition and not a necessary condition for legitimate acquisition.
13. This view is summed up nicely by Wolf, "Contemporary Property Rights," 791–818.
14. Even Marx never explicitly denies that laborers are entitled to the fruits of their labor—"Indeed, it is natural to think that his condemnation of capitalist exploitation depends on a conviction that laborers are entitled to the whole fruits of their labor." Lawrence Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), n2, p. 121. See also, Karl Marx, *Capital* (New York: International Publishers, 1967), vol. 1, part VIII, chapter xxvi.
15. For a defense of this view of rights see G. Rainbolt, "Rights as Normative Constraints," *Philosophy and Phenomenological Research* (1993): 93–111, and Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton University Press, 1986).

16. One state of the world, S_1 , is Pareto-superior to another, S_2 , if and only if no one is worse off in S_1 than in S_2 , and at least one person is better off in S_1 than in S_2 . S_1 is *strongly* Pareto-superior to S_2 if everyone is better off in S_1 than in S_2 , and *weakly* Pareto-superior if at least one person is better off and no one is worse off. State S_1 is Pareto-optimal if no state is Pareto-superior to S_1 ; it is *strongly* Pareto-optimal if no state is *weakly* Pareto-superior to it, and *weakly* Pareto-optimal if no state is *strongly* Pareto-superior to it. Throughout this essay I will use Pareto-superiority to stand for *weak* Pareto-superiority. Adapted from G. A. Cohen's "The Pareto Argument For Inequality" in *Social Philosophy & Policy* 12 (Winter 1995): 160.

17. It is important to note that compensation is typically built into the proviso and the overall account of bettering and worsening. David Gauthier echoes this point in the following case. "In acquiring a plot of land, even the best land on the island, Eve may initiate the possibility of more diversified activities in the community as a whole, and more specialized activities for particular individuals with ever-increasing benefits to all." Gauthier, *Morals By Agreement* (Oxford: Clarendon Press, 1986), 204. Eve's appropriation may actually benefit her fellows and the benefit may serve to cancel the worsening that occurs from restricted use. Moreover, compensation can occur at both the level of the act and at the level of the institution. This is to say that Eve herself may compensate or that the system in which specific property relations are determined may compensate.

18. I have in mind Nozick's Robinson Crusoe case in *Anarchy, State, And Utopia* (New York: Basic Books, 1974), 185.

19. The distinction between worsening someone's position and failing to better it is a hotly contested moral issue. See Gauthier, *Morals By Agreement*, 204; Shelly Kagan, *The Limits of Morality* (Oxford University Press, 1989), chap. 3; John Harris, "The Marxist Conception of Violence," *Philosophy & Public Affairs* 3 (1973-74): 192-220; John Kleinig, "Good Samaritanism," *Philosophy & Public Affairs* 5 (1975-76): 382-407; and Eric Mack's two articles, "Bad Samaritanism and the Causation of Harm," *Philosophy & Public Affairs* 9 (1979-80): 230-259, and "Causing and Failing To Prevent Harm," *Southwestern Journal of Philosophy* 7 (1976): 83-90. This distinction is even further blurred by my account of opportunities. See Moore, "Toward A Lockean Theory," 88-89.

20. This view is summed up nicely by A. Fressola. "Yet, what is distinctive about persons is not merely that they are agents, but more that they are rational planners—that they are capable of engaging in complex projects of long duration, acting in the present to secure consequences in the future, or ordering their diverse actions into programs of activity, and ultimately, into plans of life." Anthony Fressola, "Liberty and Property," *American Philosophical Quarterly* (Oct. 1981): 320.

21. One problem with a Pareto condition is that it says nothing about the initial position from which deviations may occur. If the initial position is unfair then our Pareto condition allows those who are unjustly better off to remain better off. This is why the problem of original acquisition is traditionally set in the state of nature or the commons. The state of nature supposedly captures a fair initial starting point for Pareto improvements.

22. It has been argued that subjective preference satisfaction theories fail to give an adequate account of bettering and worsening. See D. Hubin and M. Lambeth's "Providing For Rights," *Dialogue* (1989).

23. For similar views see: Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), chap. VII; Aristotle, *Nicomachean Ethics*, books I and X; Kant, *The Fundamental Principles of The Metaphysics of Morals*, Academy Edition; Sidgwick, *Methods of Ethics*, 7th ed. (London: Macmillan, 1907); R. B. Perry, *General Theory of Value* (New York: Longmans, Green,

1926); and Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987).

24. One plausible exception is body rights which are similar to, if not the same as, many of the rights that surround property.

25. There may be many others, such as consent theories, consequentialist theories, social contract theories, theories of convention, and so on.

26. The proviso permits the use, exclusion and augmentation of an object. Although this does not give us a complete theory of property relations it begins the process. I would argue that the proviso, whatever other forms of property relations it might allow, permits private property relations.

27. Suppose that one way to achieve Pareto-superior results is by adopting an institution that promotes and maintains restricted access, or fencing, of intellectual works. This is to say that, given our best estimates, everyone is better off living within an institution where fencing is permitted and protected as opposed to alternative institutions where fencing is prohibited. If such a case can be made, then the Paretian may have a way to justify specific acts of appropriation by appealing to the level of institutions.

28. The "harm" that I have in mind here is in terms of an individual's level of well-being. Obviously alternative accounts of bettering and worsening will defend a different standard of harm.

29. Alan Westin, "Privacy in the Modern Democratic State," in D. Johnson and J. Snapper, *Ethical Issues in the Use of Computers* (Wadsworth, 1985): 187.

30. W. A. Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs* (Fall 1983): 269–288, reprinted in D. Johnson and J. Snapper, *Ethical Issues in the Use of Computers* (Wadsworth, 1985), 203 (all page citations refer to the reprint).

31. Dean William Prosser, "Privacy," *California Law Review* 48 (1960): 383, 389, quoted in E. Alderman and C. Kennedy, *The Right to Privacy* (New York: Alfred A. Knopf, 1995), 155–56.

32. C. Rossiter, *Aspects of Liberty* (Ithaca, N.Y.: Cornell University Press, 1958) quoted in Westin, "Privacy in the Modern Democratic State," 188.

33. For more about privacy rights, see Charles Fried, "Privacy," *Yale Law Journal* 77 (1968): 477; A. Westin and M. Baker, *Databanks in a Free Society* (New York: Quadrangle Press, 1972); and J. Rachels, "Why Privacy is Important," *Philosophy and Public Affairs* 4 (Summer 1975): 323–33.

34. Would I be doing something morally illicit if I put on my new anti-monitoring suit that afforded me complete protection from every surveillance device except the human eye?

35. This case is cited in E. Alderman and C. Kennedy's *The Right to Privacy*, 171.

36. Rachels, in "Why Privacy is Important," argues that privacy is valuable because it is necessary for creating and maintaining different kinds of relationships with people.

37. Sissela Bok, *Secrets* (New York: Pantheon, 1982), 254.

***1289 Tele2 Sverige AB v Post-och telestyrelsen**

Regina (Watson) v Secretary of State for the Home Department (Open Rights Group and others intervening)

Regina (Brice) v Secretary of State for the Home Department (Open Rights Group and others intervening)

Regina (Lewis) v Secretary of State for the Home Department (Open Rights Group and others intervening)

(Joined Cases C-203/15 and C-698/15), EU:C:2016:572, EU:C:2016:970

Court of Justice of the European Union

21 December 2016

[2017] 2 W.L.R. 1289

President K Lenaerts , Vice-President A Tizzano , Presidents of Chamber R Silva de Lapuerta ,
T von Danwitz , JI da Cruz Vilça , E Juhász , M Vilaras , Judges A Borg Barthet , J
Malenovský , E Levits , J-C Bonichot , A Arabadjiev , S Rodin , F Biltgen , C Lycourgos
Advocate General H Saugmandsgaard Øe

2016 Feb 1; April 12; July 19; Dec 21

Data protection—Personal data—Access to—Swedish legislation allowing general and indiscriminate retention of all traffic and location data of all users with respect to all means of electronic communications—Swedish and United Kingdom legislation not restricting access to data according to objective of fighting serious crime—Access not subject to prior review—No requirement that data should be retained within European Union—Whether legislation compatible with European Union law— Data Retention and Investigatory Powers Act 2014 (c 27), s 1 — Charter of Fundamental Rights of the European Union, arts 7, 8, 11, 52(1) — Parliament and Council Directive 2002/58/EC (as amended by Parliament and Council Directive 2009/136/EC), art 15(1)

In 2014 the Court of Justice of the European Union declared Parliament and Council Directive 2006/24/EC , on the retention of electronic communications data, invalid as a disproportionate interference with the rights to privacy and the protection of personal data under articles 7 and 8 , respectively, of the Charter of Fundamental Rights of the European Union¹ . Swedish law transposing that Directive provided, for the purpose of combating crime, for a general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication, and imposed on providers of electronic communications services an obligation to retain those data systematically and continuously, with no exceptions. The categories of data covered by that legislation ***1290** corresponded to the data the retention of which was required by that Directive. By section 1 of the Data Retention and Investigatory Powers Act 2014² , which was enacted to provide an emergency legal basis for data retention in

the United Kingdom after the domestic regime implementing Directive 2006/24 had been discarded following the Court of Justice's judgment, the Home Secretary could adopt, without prior authorisation, a general regime requiring providers of public electronic communications services to retain all data relating to any postal or telecommunications service, in the interests of, *inter alia*, national security.

In Swedish proceedings an appellate court considered that the Swedish national provisions fell within the scope of article 15(1) of Parliament and Council Directive 2002/58/EC³, which remained the governing provision for exceptions to communications confidentiality after the rejection of Directive 2006/24 and which allowed, as an exception to the general rule, the retention of electronic communications data on one of the grounds specified therein. In English proceedings the Court of Appeal concluded that the 2014 Act similarly fell within the scope of article 15(1). Both courts referred to the Court of Justice for preliminary rulings the questions, in essence, whether article 15(1), read in the light of articles 7, 8 and 52(1) of the Charter precluded national legislation such as (i) the Swedish provisions in issue and (ii) both the Swedish and the United Kingdom provisions governing the access of national authorities to retained data, where that legislation did not restrict the access solely to the objective of fighting serious crime and was not subject to prior review, and where there was no requirement that the data concerned should be retained within the European Union. The Court of Justice considered that the questions also related to the right to freedom of expression under article 11 of the Charter.

On the references—

Held, (1) that the scope of Parliament and Council Directive 2002/58/EC extended to a legislative measure which required the provider of a publicly available electronic communications service to retain, and to grant national authorities access to, traffic and location data, since to do so involved the processing of personal data; and that, accordingly, the national Swedish and United Kingdom legislation in issue fell within the scope of that Directive (post, judgment, paras 75, 76, 78, 81).

(2) That the list of objectives permitted under national legislation which derogated from the principle of confidentiality of communications and related traffic data, provided by article 15(1) of Directive 2002/58, was exhaustive; that the rights to privacy, protection of personal data, and freedom of expression, under articles 7, 8 and 11 respectively of the Charter, had to be taken into consideration when interpreting article 15(1); that, since the Swedish legislation in issue required providers of electronic communications services to retain data which allowed very precise conclusions to be drawn concerning the private lives of the users and provided the means of establishing a profile of the individuals concerned, it entailed very serious and far reaching interference with the fundamental rights established by articles 7 and 8 of the Charter, and the retention of such data could have an effect on the exercise of the users' freedom of expression guaranteed by article 11; that, given that seriousness, only the objective of fighting

serious crime was capable of justifying such legislative measures; but that such an objective could not justify a general and indiscriminate retention of all traffic and location data, since the retention of data was the exception to the general rule of confidentiality under the system of Directive 2002/58 ; that since the Swedish legislation in issue provided for no differentiation, limitation or exception according to the objective pursued, or to the user concerned, and did not require any relationship between the data retained and a threat to public security, it exceeded the limits of what was strictly necessary and was not justified, as ***1291** required by article 15(1) of Directive 2002/58 , read in the light of articles 7, 8, 11 and 52(1) of the Charter; and that, accordingly, article 15(1) of the Directive, read in the light of those articles of the Charter, precluded national legislation such as the Swedish provisions in issue which provided for the general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication, for the purpose of fighting crime (post, judgment, paras 90, 93, 98 –107, 112, operative part, para 1).

Productores de Música de España (Promusicae) v Telefónica de España SAU (Case C-275/06) [2008] All ER (EC) 809 , ECJ, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources (Irish Human Rights Commission intervening) (Joined Cases C-293/12 and C-594/12) [2015] QB 127 , ECJ and Schrems v Data Protection Comr (Case C-362/14) [2016] QB 527 , ECJ applied.

(3) That it was for national law to determine the conditions under which providers of electronic communications services had to grant access to retained data, in order to ensure that such access was limited to what was strictly necessary; but that the legislation could not be limited to requiring that such access should be for one of the objectives under article 15(1) of Directive 2002/58 , since it also had to lay down the substantive and procedural conditions governing the access; that, since a general right of access to all retained data was not limited to what was strictly necessary, the national legislation concerned had to be based on objective criteria in order to define the circumstances and conditions under which the national authorities were to be granted such access; that access could be granted, in relation to the objective of fighting crime, only to the data of individuals suspected of being involved in a serious crime; that, in order to ensure that those conditions were respected, access by the authorities to retained data had to be subject to prior review by a court or independent administrative body, except in cases of urgency, and the decision of that court or body should be made following a reasoned request by the authorities; that the national authorities to which access to retained data had been granted had to notify the persons affected as soon as such notification was not liable to jeopardise the authorities' investigations; and that, accordingly, article 15(1) of Directive 2002/58 , read in the light of articles 7, 8, 11 and 52(1) of the Charter precluded national legislation, such as the Swedish and United Kingdom provisions, governing the protection and security of traffic and location data and, in particular, access of the national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, was not restricted solely to fighting serious crime, where access was not subject to prior review, and where

there was no requirement that the data concerned should be retained within the European Union (post, judgment, paras 118–121; 125, operative part, para 2).

Per curiam. Article 15(1) of Directive 2002/58, read in the light of articles 7, 8, 11 and 52(1) of the Charter, does not prevent a member state from adopting legislation permitting, as a preventative measure, the targeted retention of traffic and location data for the purpose of fighting serious crime, provided that such retention is limited to what is strictly necessary, with respect to the categories of data, the means of communication affected, the persons concerned and the retention period adopted (post, judgment, paras 108–111).

The following cases are referred to in the judgment:

Åklagaren v Åkerberg-Fransson (Case C-617/10) EU:C:2013:105; [2013] STC 1905, ECJ
 College van burgemeester en wethouders van Rotterdam v Rijkeboer (Case C-553/07) EU:C:2009:293; [2009] ECR I-3889, ECJ
 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources (Irish Human Rights Commission intervening) (Joined Cases C-293/12 and C-594/12) EU:C:2014:238; [2015] QB 127; [2014] 3 WLR 1607; [2014] 2 All ER (Comm) 1; [2014] All ER (EC) 775, ECJ ***1292**
***1292**
 Eugen Schmidberger Internationale Transporte und Planzüge v Republic of Austria (Case C-112/00) EU:C:2003:333; [2003] ECR I-5659, ECJ
 Google Spain SL v Agencia Española de Protección de Datos (AEPD) (Case C-131/12) EU:C:2014:317; [2014] QB 1022; [2014] 3 WLR 659; [2014] 2 All ER (Comm) 301; [2014] All ER (EC) 717, ECJ
 Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (Case C-571/10) EU:C:2012:233; [2013] All ER (EC) 125, ECJ
 Lindqvist, Criminal proceedings against (Case C-101/01) EU:C:2003:596; [2004] QB 1014; [2004] 2 WLR 1385; [2004] All ER (EC) 561; [2003] ECR I-12971, ECJ
 N v Staatssecretaris voor Veiligheid en Justitie (Case C-601/15PPU) EU:C:2016:84; [2016] 1 WLR 3027, ECJ
 Patriciello, Criminal proceedings against (Case C-163/10) EU:C:2011:543; [2011] ECR I-7565, ECJ
 Pohotovost'sro v Vašuta (Združenie na ochranu obcna spotrebite'a HOOS intervening) (Case C-470/12) EU:C:2014:101; [2014] 1 All ER (Comm) 1016, ECJ
 Probst v mr nexnet GmbH (Case C-119/12) EU:C:2012:748; [2013] CEC 913, ECJ
 Productores de Música de España (Promusicae) v Telefónica de España SAU (Case C-275/06) EU:C:2008:54; [2008] All ER (EC) 809; [2008] ECR I-271, ECJ
 Rechnungshof v Österreichischer Rundfunk (Joined Cases C-465/00, C-138/01 and C-139/01) EU:C:2003:294; [2003] ECR I-4989, ECJ
 Schrems v Data Protection Comr (Case C-362/14) EU:C:2015:650; [2016] QB 527; [2016] 2 WLR 873, ECJ
 Szabó v Hungary CE:ECHR:2016:0112JUD003713814; 63 EHRR 3
 Tietosuoja-valtuutettu v Satakunnan Markkinapörssi Oy (Case C-73/07) EU:C:2008:727; [2010] All ER (EC) 213; [2008] ECR I-9831, ECJ
 Volker und Markus Schecke GbR v Land Hessen (Bundesanstalt für Landwirtschaft und Ernährung, joint party) (Joined Cases C-92/09 and C-93/09) EU:C:2010:662; [2012] All ER (EC) 127; [2010] ECR I-11063, ECJ
 Zakharov v Russia CE:ECHR:2015:1204JUD004714306; 63 EHRR 17

The following additional cases are referred to in the opinion of the Advocate General:

Abt v Hypo Real Estate Holding AG (Case C-194/10) EU:C:2011:182, ECJ
 Asbeek Brusse v Jahani BV (Case C-488/11) EU:C:2013:341; [2013] HLR 38, ECJ
 CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (Nikolova, third parties) (Case C-83/14) EU:C:2015:480; [2015] All ER (EC) 1083, ECJ

Christie's France SNC v Syndicat national des antiquaires (Case C-41/14)
 EU:C:2015:119; [2015] ECDR 14 , ECJ
 Delvigne v Commune de Lesparre-Médoc (Case C-650/13) EU:C:2015:648; [2016] 1
 WLR 1223 , ECJ
 Hassan v Bulgaria CE:ECHR:2000:1026JUD003098596, GC
 Hotel Sava Rogaška, gostinstvo, turizem in storitve doo v Republic of Slovenia (Case
 C-207/14) EU:C:2015:414, ECJ
 Institut professionnel des agents immobiliers (IPI) v Englebert (Case C-473/12)
 EU:C:2013:715; [2014] 2 CMLR 9 , ECJ
 Ireland v European Parliament (Case C-301/06) EU:C:2009:68; [2009] All ER (EC)
 1181; [2009] ECR I-593 , ECJ
 Knauf Gips KG v European Commission (Case C-407/08P) EU:C:2010:389; [2010] 5
 CMLR 12 , ECJ
 Kopp v Switzerland EC:ECHR:1998:0325JUD002322494; 27 EHRR 91
 Leander v Sweden EC:ECHR:1987:0326JUD000924881; 9 EHRR 433
 Neptune Distribution SNC v Ministre de l'économie et des Finances (Case C-157/14)
 EU:C:2015:823; [2016] 2 CMLR 24 , ECJ ***1293**
***1293**

Opinion 2/13 EU:C:2014:2454; [2015] All ER (EC) 463 , ECJ
 Reindl v Bezirkshauptmannschaft Innsbruck (Case C-443/13) EU:C:2014:2370, ECJ
 Rijksdienst voor Werknemeerspansioenen v Vlaeminck (Case C-132/81)
 EU:C:1982:294; [1982] ECR 2953 , ECJ
 S v United Kingdom (2008) 48 EHRR 50 , GC
 Sanoma Uitgevers BV v The Netherlands EC:ECHR:2010:0914JUD003822403; [2011]
 EMLR 4 , GC
 Schwarz v Stadt Bochum (Case C-291/12) EU:C:2013:670; [2014] 2 CMLR 5 , ECJ
 Sky Österreich GmbH v Österreichischer Rundfunk (Case C-283/11) EU:C:2013:28;
 [2013] All ER (EC) 633 , ECJ
 Spasic, Criminal proceedings against (Case C-129/14PPU) EU:C:2014:586; [2015] 2
 CMLR 1 , ECJ
 Stoilov i Ko EOOD v Nachalnik na Mitnitsa Stolichna (Case C-180/12) EU:C:2013:693,
 ECJ
 Stoyanov v Bulgaria EC:ECHR:2016:0331JUD005538810
 Telegraaf Media Nederland Landelijke Media BV v The Netherlands
 EC:ECHR:2012:1122JUD003931506; 34 BHRC 193
 WebMindLicenses Kft v Nemzeti Adó-és Vámhivatal Kiemelt Adó-és Vám Főigazgatóság
 (Case C-419/14) EU:C:2015:832; [2016] 4 WLR 50 , ECJ

Tele2 Sverige AB v Post-och telestyrelsen (Case C-203/15)

REFERENCE by the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm),
 Sweden

By an order dated 29 April 2015, in proceedings between the claimant, Tele2 Sverige AB, and
 Post-och telestyrelsen (the Swedish Post and Telecommunications Authority), concerning an
 order sent by the authority to the claimant requiring the latter to retain traffic and location
 data in relation to its subscribers and registered users, the Kammarrätten i Stockholm,
 Sweden, referred to the Court of Justice of the European Union for a preliminary ruling a
 number of questions, post, judgment para 51, on the interpretation of article 15(1) of
 Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of
 personal data and the protection of privacy in the electronic communications sector (OJ 2002
 L201 , p 37), as amended by Parliament and Council Directive 2009/136/EC of 25 November
 2009 (OJ 2009 L337 , p 11), read in the light of articles 7 and 8 and article 52(1) of the
 Charter of Fundamental Rights of the European Union .

By decision of the Court of Justice of 10 March 2016 the case was joined with R (Watson) v Secretary of State for the Home Department (Open Rights Group intervening) (Case C-698/15) for the purposes of the oral part of the procedure and the judgment.

The judge rapporteur was Judge von Danwitz.

The facts are stated, post, opinion, points 50–54; judgment, paras 44 –48.

Regina (Watson) v Secretary of State for the Home Department (Open Rights Group intervening) (Case C-698/15)

REFERENCE by the Court of Appeal

By claim forms (i) the claimants, David Davis MP and Tom Watson MP, (ii) the claimant, Peter Brice, and (iii) the claimant, Geoffrey Lewis, claimed against the Secretary of State for the Home Department judicial review by way of a declaration that the data retention powers contained in section 1 of the Data Retention and Investigatory Powers Act 2014 were contrary to *1294 European Union law as expounded in the Court of Justice of the European Union's judgment delivered on 8 April 2014 in Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources (Irish Human Rights Commission intervening) (Joined Cases C-293/12 and C-594/12) [2015] QB 127 . On 8 December 2014 Lewis J granted permission to proceed with the claim. Permission to intervene was granted to the Open Rights Group, Privacy International and the Law Society of England and Wales.

By a judgment and order dated 17 July 2015, but suspended until 31 March 2016, the Divisional Court of the Queen's Bench Division (Bean LJ and Collins J) [2015] EWHC 2092 (Admin); [2016] 1 CMLR 13 allowed the claims.

By appellant's notices and pursuant to the permission of the Divisional Court, the Secretary of State appealed on the grounds, inter alia, that the Court of Justice in the Digital Rights Ireland case had not imposed mandatory requirements which had to be applied to national legislation; and the Charter of Fundamental Rights of the European Union did not apply to national rules concerning access by law enforcement bodies to communications data, so that the Digital Rights Ireland case did not impose substantive requirements on national law based on the Charter in areas where the Charter did not apply.

By a respondent's notice the claimants sought to uphold the decision of the Divisional Court and further contended that it should have held that the observations of the Court of Justice on safeguards against the removal of communications data from the European Union constituted further mandatory requirements of European Union law with which the 2014 Act did not comply. By a judgment and order dated 20 November 2015 the Court of Appeal (Patten, Lloyd Jones and Vos LJ) [2015] EWCA Civ 1185; [2017] 1 All ER 62 referred to the Court of Justice for a preliminary ruling a number of questions, post, judgment, para 59, on the interpretation of article 15(1) of Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ 2002 L201 , p 37), as amended by Parliament and Council Directive 2009/136/EC of 25 November 2009 (OJ 2009 L337 , p 11), read in the light of articles 7, 8 and 52(1) of the Charter of Fundamental Rights of the European Union .

The first claimant in the first claim in the second case was not a party to the proceedings in the Court of Justice.

By decision of the Court of Justice of 10 March 2016, the case was joined with *Tele2 Sverige AB v Post-och telestyrelsen* (Case C-203/15) for the purposes of the oral part of the procedure and the judgment.

The judge rapporteur was Judge von Danwitz.

The facts are stated, post, opinion, points 56–60; judgment, paras 52–56.

M Johansson , *N Torgerzon* , *E Lagerlöf* and *S Backman* for the claimant in the first case.

Dinah Rose QC , *Iain Steele* and *Ben Jaffey* (instructed by *LIBERTY*) for the second claimant in the first claim in the second case.

Richard Drabble QC , *Azeem Suterwalla* and *Ramby de Mello* (instructed by *Bhatia Best Solicitors*) for the claimants in the second and third claims in the second case.

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Ravi Mehta and *Jessica Simor* (instructed by *Deighton Pierce Glynn Solicitors*) for the first and second interveners.

Tom Hickman and *Natalie Turner* (instructed by *The Law Society of England and Wales*) for the third intervener.

A Falk , *C Meyer-Seitz* , *U Persson* , *N Otte Widgren* and *L Swedenborg* , agents, for the Swedish Government.

Daniel Beard QC , *Gerry Facenna QC* , *James Eadie QC* and *Sarah Ford* (instructed by *Treasury Solicitor*) for the United Kingdom Government

J-C Halleux , *S Vanrie* and *C Pochet* , agents, for the Belgian Government.

M Smolek and *J Vlácil* , agents, for the Czech Government.

C Thorning and *M Wolff* , agents, for the Danish Government.

M Kottmann and *U Karpenstein* (instructed by *T Henze* , *M Hellmann* and *J Kemper* , agents) for the German Government.

K Kraavi-Käerdi , agent, for the Estonian Government.

David Fennelly BL (instructed by *E Creedon* , *L Williams* and *A Joyce* , agents) for Ireland.

A Rubio González , agent, for the Spanish Government.

G de Bergues , *D Colas* , *F-X Bréchet* and *C David* , agents, for the French Government.

K Kleanthous , agent, for the Cypriot Government.

M Fehér and *G Koós* , agents, for the Hungarian Government.

M Bulterman , *M Gijzen* and *J Langer* , agents, for the Netherlands Government.

B Majczyna , agent, for the Polish Government.

J Heliskoski , agent, for the Finnish Government.

H Krämer , *K Simonsson* , *H Kranenborg* , *D Nardi* , *P Costa de Oliveira* and *J Vondung* , agents, for the European Commission.

19 July 2016. ADVOCATE GENERAL H SAUGMANDSGAARD ØE

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I— Introduction

1 In 1788, James Madison, one of the authors of the United States Constitution, wrote:

“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”^{4 5}

2 The present cases lead us into the heart of this “great difficulty” identified by Madison. They concern the compatibility with European Union (“EU”) law of national regimes which impose on providers of publicly accessible electronic communications services (“service providers”) an obligation to retain data relating to electronic communications (“communications data”) in relation to all means of communication and all users (“a general data retention obligation”).

3 On the one hand, the retention of communications data enables “the government to control the governed” by providing the competent authorities with a means of investigation that may prove useful in fighting serious crime, and in particular in combating terrorism. In substance, the retention of communications data gives the authorities a certain ability to “examine the past” by accessing data relating to communications which a person has effected even before being suspected of involvement in a serious crime⁶.

4 However, on the other hand, it is imperative to “oblige [the government] to control itself”, with respect to both the retention of data and access to the data retained, given the grave risks engendered by the existence of databases which encompass all communications made within the national ***1298** territory. Indeed, these enormous databases give anyone having access to them the power instantly to catalogue every member of the population in question: see points 252–261 below. These risks must be scrupulously addressed, inter alia, by means of an examination of the strict necessity and proportionality of general data retention obligations, such as those at issue in the main proceedings.

5 Thus, in the present cases, the Court of Justice and the referring courts are prevailed upon to pinpoint the correct balance between the obligation which member states are under to ensure the security of individuals within their territory and observance of the fundamental

rights to privacy and the protection of personal data, enshrined in articles 7 and 8 of the Charter of Fundamental Rights of the European Union ("the Charter").

6 I shall be mindful of Madison's "great difficulty" as I examine the questions referred to the court in the present cases, which concern, more specifically, the compatibility with Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ("the Directive on privacy and electronic communications") (OJ 2002 L201 , p 37), as amended by Parliament and Council Directive 2009/136/EC of 25 November 2009 (OJ 2009 L337 , p 11) and articles 7 and 8 of the Charter of national regimes establishing a general data retention obligation. In order to answer those questions, the court will in particular need to clarify how its judgment in *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (Irish Human Rights Commission intervening) (Joined Cases C-293/12 and C-594/12) [2015] QB 127 , in which the Grand Chamber of the court held Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L105 , p 54) to be invalid, is to be interpreted in the national context.

7 For the reasons which I shall set out below, I have the feeling that a general data retention obligation imposed by a member state may be compatible with the fundamental rights enshrined in EU law, provided that it is strictly circumscribed by a series of safeguards, and I shall identify these in the course of my analysis.

II— Legal framework

A— Directive 2002/58

8 Article 1 of Directive 2002/58 , entitled "Scope and aim", provides:

"1. This Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the [European Union].

"2. The provisions of this Directive particularise and complement [Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281 , p 31)] for *1299 the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons.

"3. This Directive shall not apply to activities which fall outside the scope of the [FEU Treaty], such as those covered by Titles V and VI of the [EU Treaty], and in any case to activities concerning public security, defence, state security

(including the economic well-being of the state when the activities relate to state security matters) and the activities of the state in areas of criminal law."

9 Article 15(1) of Directive 2002/58 , entitled "Application of certain provisions of Directive [95/46] ", is worded as follows:

"Member states may adopt legislative measures to restrict the scope of the rights and obligations provided for in article 5, article 6, article 8(1)(2)(3)(4), and article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (ie state security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in article 13(1) of Directive [95/46] . To this end, member states may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of [EU] law, including those referred to in article 6(1)(2) [of the EU Treaty] ."

B— Swedish law

10 Directive 2006/24 , which has now been held to be invalid, was transposed into Swedish law by the amendments made to Lagen (2003:389) om elektronisk kommunikation (Law 2003:389 on electronic communications) ("the LEK") and to Förrordningen (2003:396) om elektronisk kommunikation (Regulation 2003:396 on electronic communications) ("the FEK"), both of which entered into force on 1 May 2012.

1. The scope of the retention obligation

11 It is clear from the provisions of paragraph 16a of Chapter 6 of the LEK that service providers are required to retain the communications data necessary to identify the source and destination of communications, the date, time, duration and type of each communication, the communications equipment used and the location of mobile communication equipment used at the start and end of each communication. The types of data that must be retained are specified in further detail in paragraphs 38 –43 of the FEK.

12 This retention obligation relates to data processed in the context of telephony services, telephony services which use a mobile connection, electronic messaging systems, internet access services and internet access capacity provision services.

13 The data to be retained include not only all the data that had to be retained pursuant to Directive 2006/24 , but also data relating to unsuccessful communications as well as data relating to the location at which mobile telephone communications are ended. As under the regime ***1300** laid down in the Directive, the data to be retained do not include the content of communications.

2. Access to retained data

14 Access to retained data is governed by three laws, namely the LEK, the Rättegångsbalken (Code of Judicial Procedure) ("the RB") and the Lagen (2012:278) om inhämtning av uppgifter om elektronisk kommunikation i de brottsbekämpande myndigheternas underrättelseverksamhet (Law 2012:278 on the collection of data on electronic communications in the law enforcement authorities' investigative activities) ("Law 2012:278").

(a) The LEK

15 Under the provisions of point 2 of the first sub-paragraph of paragraph 22 of Chapter 6 of the LEK, every service provider must communicate subscription data, on request, to the prosecuting authority, to the police, to the Säkerhetspolisen (the Swedish security service) ("the Säpo") and to any other public law enforcement authority, if the data relate to a suspected crime. Under those provisions, it is not necessary for the crime in question to be a serious crime.

16 Subscription data means, in substance, data relating to the name, title, postal address, telephone number and the internet protocol address ("IP address") of the subscriber.

17 Under the LEK, the communication of subscription data is not subject to any prior review, although it may be the subject of an ex post facto administrative review. In addition, there are no limits on the number of authorities that may have access to the data.

(b) The RB

18 The RB governs the surveillance of electronic communications in the course of preliminary investigations.

19 In substance, the surveillance of electronic communications may be ordered only where there is credible evidence to suggest that a person has committed an offence punishable by a term of imprisonment of not less than six months or some other specifically identified offence, if such a measure is particularly necessary for the investigation.

20 In addition to the cases just mentioned, such surveillance may be carried out for the purposes of investigating any person where there is a serious suspicion that he has committed an offence that is punishable by a term of imprisonment of not less than two years, if such a measure is particularly necessary for the investigation.

21 Under paragraph 21 of Chapter 27 of the RB, the prosecuting authority must normally obtain the authorisation of a competent court before commencing the surveillance of electronic communications.

22 Notwithstanding, if it appears that making an application to a competent court before commencing the surveillance of electronic communications—where such a measure is of vital importance to the investigation—is incompatible with the urgency of the investigation or would hinder it, authorisation may be granted by the prosecuting authority pending a decision of a competent court. The prosecuting authority must immediately inform the court thereof in writing and the court must then promptly consider whether the measure is justified.

(c) Law 2012:278

23 In the context of information gathering, under paragraph 1 of Law 2012:278, the national police, the Säpo and the Tullverket (the Swedish customs authority) may, subject to the conditions laid down in that law, collect communications data without the knowledge of the service provider.

24 Under paragraphs 2 and 3 of Law 2012:278, data may be collected where the circumstances are such that it is particularly necessary to do so in order to avert, prevent or detect criminal activity involving one or more offences punishable by a term of imprisonment of no less than two years or one of the acts listed in paragraph 3 (which include, in particular, various forms of sabotage and espionage).

25 A decision to collect data in this way is taken by the head of the authority concerned or by another person to whom that power is delegated.

26 The decision must indicate the criminal activity in question, the period covered and the telephone number, any other address, the electronic communications equipment and the geographical area concerned. The duration of the authorisation must not be longer than is necessary. The period following the date of an authorisation decision may not exceed one month.

27 This type of measure is not subject to any prior review. However, pursuant to paragraph 6 of Law 2012:278, the Säkerhets-och integritetsskyddsnämnden (the Commission on Security and Integrity Protection), Sweden, must be informed of any decision authorising the collection of data. Under paragraph 1 of Lagen (2007:980) om tillsyn över viss brottsbekämpande verksamhet (Law 2007:980 on the supervision of certain law enforcement activities), that body must supervise the application of the law by the law enforcement authorities.

3. The period for which data are retained

28 It is clear from the provisions of paragraph 16d of Chapter 6 of the LEK that the data referred to in paragraph 16a thereof must be retained for a period of six months from the day on which the communication is terminated, after which they must immediately be erased, unless otherwise provided for in the second sub-paragraph of paragraph 16d of Chapter 6 of the LEK. Pursuant to those last provisions, data that has been requested before the expiry of the retention period but not communicated must be erased immediately after it is communicated.

4. The protection and security of the data retained

29 The first sub-paragraph of paragraph 20 of Chapter 6 of the LEK prohibits the unauthorised dissemination or use of communications data.

30 Pursuant to the provisions of paragraph 3a of Chapter 6 of the LEK, service providers must take appropriate technical and organisational measures to ensure that processed data are protected. The preparatory work relating to that provision indicates that it is not

permissible to determine the level of protection by weighing technical considerations against costs and the risk of infringement of privacy.

31 Further rules on data protection are set out in paragraph 37 of the FEK and in the regulations and guidelines of the Post-och telestyrelsen (the Swedish Post and Telecommunications Authority) (the "PTS") on safeguards in the retention and processing of data for law enforcement purposes (PTSFS *1302 No 2012:4). Those texts state, inter alia, that service providers must take measures to protect data against unintentional or unauthorised destruction, against unauthorised retention, processing and access and against unauthorised disclosure. Service providers must also continually and systematically ensure the security of data, having regard to the particular risks associated with the retention obligation.

32 Swedish law contains no provisions concerning the place where the data are to be stored.

33 Under Chapter 7 of the LEK, the regulatory authority has power, where service providers fail to fulfil their obligations, to issue orders and prohibitions, which may carry a penalty, and to order a partial or total cessation of business.

C— United Kingdom law

34 The provisions governing the retention of data are set out in the Data Retention and Investigatory Powers Act 2014, the Data Retention Regulations 2014 (SI 2014/2042) and the Retention of Communications Data Code of Practice ("the Retention Code of Practice").

35 The provisions governing access to communications data are to be found in Chapter II of Part I of the Regulation of Investigatory Powers Act 2000, the Regulation of Investigatory Powers (Communications Data) Order 2010 (SI 2010/480), as amended by the Regulation of Investigatory Powers (Communications Data) (Amendment) Order 2015 (SI 2015/228) ("the RIPA (Amendment) Order") and the Acquisition and Disclosure of Communications Data Code of Practice ("the Acquisition Code of Practice").

1. The scope of the retention obligation

36 Under section 1 of the 2014 Act, the Secretary of State for the Home Department may require service providers to retain relevant communications data. In substance, that obligation may extend to all the data generated as a result of communications using a postal service or a telecommunication system, with the exception of the content of the communication. The data may include, in particular, the location of the user of the service and data identifying the IP address or any other identifier belonging to the sender or recipient of a communication.

37 The purposes which may justify the issuing of a retention notice include the interests of national security, the prevention or detection of crime or the prevention of disorder, the interests of the economic well-being of the United Kingdom in so far as those interests are also relevant to the interests of national security, the interests of public safety, the protection of public health, the assessment or collection of any tax, contribution or other sum payable to the government, the prevention of harm to physical or mental health in urgent cases, providing assistance in investigations into alleged miscarriages of justice, the identification of

persons who have died or who are unable to identify themselves because of a condition other than one resulting from a crime (such as a natural disaster or an accident), exercising functions relating to the regulation of financial services and markets or to financial stability and any other purpose specified in an order made by the Home Secretary under section 22 (2) of the 2014 Act.

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38 There is no requirement in the national legislation for the issue of a retention notice to be subject to prior judicial or independent authorisation. The Home Secretary must ensure that the retention obligation is "necessary and proportionate" to one or more of the purposes that is to be achieved by retaining the relevant communications data.

2. Access to retained data

39 Under section 22(4) of the 2000 Act, the public authorities may, by notice, require service providers to disclose communications data to them. The form and content of such notices is governed by section 23(2) of the 2000 Act. Such notices are limited in time by provisions governing cancellation and renewal.

40 The acquisition of communications data must be necessary and proportionate to one or more of the purposes set out in section 22 of the 2000 Act, which correspond to the purposes which may justify the retention of data described in point 37 above.

41 It is clear from the Acquisition Code of Practice that a court order is necessary in the case of an application for access which is made in order to identify a journalist's source, as in the case of applications for access made by local authorities.

42 Leaving aside those cases, before public authorities can access data it is necessary for authorisation to be given by the designated person within the relevant authority. A designated person is the person holding the prescribed office, rank or position within the relevant public authority that has been designated for the purpose of acquiring communications data in the RIPA (Amendment) Order.

43 No judicial or independent authorisation is specifically required in order to access communications data that is subject to legal professional privilege or communications data relating to medical doctors, Members of Parliament or ministers of religion. The Acquisition Code of Practice merely states that special consideration must be given to the necessity and proportionality of applications for access to such data.

3. The period for which data are retained

44 Section 1(5) of the 2014 Act and regulation 4(2) of the 2014 Regulations provide for a maximum data retention period of 12 months. In accordance with the Retention Code of Practice, the period must be only as long as is necessary and proportionate. Regulation 6 of the 2014 Regulations requires the Home Secretary to keep retention notices under review.

4. The protection and security of the data retained

45 Under section 1 of the 2014 Act, service providers are prohibited from disclosing retained data unless such disclosure is in accordance with Chapter II of Part I of the 2000 Act, a court order or other judicial authorisation or warrant or a regulation adopted by the Home Secretary under section 1 of the 2014 Act.

46 In accordance with regulations 7 and 8 of the 2014 Regulations, service providers must ensure the integrity and security of retained data, protect them from accidental or unlawful destruction, accidental loss or alteration and unauthorised or unlawful retention, processing, access or disclosure. They must destroy the data so as to make it impossible to access ***1304** if the retention of the data ceases to be authorised and must put in place adequate security systems. Regulation 9 of the 2014 Regulations imposes a duty on the Information Commissioner to audit compliance by service providers with these requirements.

47 The authorities to which service providers transmit communications data must handle and store the data, and all copies, extracts and summaries of it, securely. In accordance with the Acquisition Code of Practice, the requirements of the Data Protection Act 1998, which transposed Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281, p 31) [which supplemented Directive 2002/58], must be observed.

48 The 2000 Act provides for an Interception of Communications Commissioner whose remit is to provide independent oversight of the exercise and performance of the powers and duties set out in Chapter II of Part I of the 2000 Act. The commissioner does not provide any oversight of the use of section 1 of the 2014 Act. He must make regular reports to the public and to Parliament (sections 57(2) and 58 of the 2000 Act) and track record keeping and reporting by public authorities: Acquisition Code of Practice, paragraphs 6.1 –6.8. Complaints may be made to the Investigatory Powers Tribunal if there is reason to believe that data have been acquired inappropriately: section 65 of the 2000 Act.

49 It is apparent from the Acquisition Code of Practice that the Interception of Communications Commissioner has no power to refer cases to the Investigatory Powers Tribunal. He may merely inform persons of a suspected unlawful use of powers if he is able to “establish that an individual has been adversely affected by any wilful or reckless failure”. However, he is not permitted to disclose information if national security could be threatened by such disclosure, even if he is satisfied that there has been a wilful or reckless failure.

III— The disputes in the main proceedings and the questions referred for a preliminary ruling

A— Case C-203/15

50 On 9 April 2014, the day after the judgment in the Digital Rights Ireland case [2015] QB 127 was handed down, Tele2 Sverige notified the PTS of its decision to cease retaining the data referred to in Chapter 6 of the LEK. Tele2 Sverige also proposed to delete the data which had been retained until then in accordance with that Chapter. Tele2 Sverige had concluded that the Swedish legislation transposing Directive 2006/24 was not in conformity with the Charter.

51 On 15 April 2014 the Rikspolisstyrelsen (the National Police Board), Sweden, ("the RPS") complained to the PTS that Tele2 Sverige had ceased transmitting to it data relating to certain electronic communications. In its complaint, the RPS stated that Tele2 Sverige's refusal to do so would have serious consequences for the police's law enforcement activities.

52 By decision of 27 June 2014, the PTS ordered Tele2 Sverige to resume the retention of data in accordance with paragraph 16a of Chapter 6 of the LEK and paragraphs 37 to 43 of the FEK by 25 July 2014 at the latest.

53 Tele2 Sverige brought an appeal before the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm), Sweden, against the PTS's ***1305** decision. By judgment of 13 October 2014, the Förvaltningsrätten i Stockholm dismissed that appeal.

54 Tele2 Sverige brought an appeal against the judgment of the Förvaltningsrätten i Stockholm before the referring court, seeking the setting aside of the contested decision.

55 Finding that there were arguments both in favour of and against the view that such an extensive retention obligation as that provided for in paragraph 16a of Chapter 6 of the LEK was compatible with article 15(1) of Directive 2002/58 and articles 7, 8 and 52(1) of the Charter, the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm), Sweden, decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

"(1) Is a general obligation to retain data in relation to all persons and all means of electronic communication and extending to all traffic data, without any distinction, limitation or exception being made by reference to the objective of fighting crime [as described in paras 13–18 of the order for reference] compatible with article 15(1) of Directive 2002/58, taking into account articles 7, 8 and 52(1) of the Charter?

"(2) In the event that the first question is answered in the negative, may such a retention obligation nevertheless be permitted where: (a) access by the national authorities to the retained data is governed in the manner specified in paras 19–36 [of the order for reference], and (b) the protection and security of the data are regulated in the manner specified in paras 38–43 [of the order for reference], and (c) all relevant data must be retained for a period of six months from the date on which the communication was terminated before then being deleted, as described in para 37 [of the order for reference]?"

B— Case C-698/15

56 Messrs Watson, Brice and Lewis have brought before the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court), applications for judicial review of the lawfulness of the data retention regime in section 1 of the Data Retention and Investigatory Powers Act 2014, which empowers the Home Secretary to require public telecommunications operators to retain communications data for a maximum period of 12 months, retention of the content of the communications concerned being excluded.

57 Open Rights Group, Privacy International and the Law Society of England and Wales were granted leave to intervene in each of those applications.

58 By judgment of 17 July 2015, the High Court (R (Davis) v Secretary of State for the Home Dept (Open Rights Group intervening) [2016] 1 CMLR 13 , declared that the regime in question was inconsistent with EU law in that it did not satisfy the requirements laid down in the Digital Rights Ireland case [2015] QB 127 , which it regarded as applying to the rules in the member states on the retention of data relating to electronic communications and on access to such data. The Home Secretary brought an appeal against that judgment before the referring court.

59 In its judgment of 20 November 2015 the Court of Appeal (England and Wales) (Civil Division) [2017] 1 All ER 62, expressed the provisional view that, in the Digital Rights Ireland case, the Court of Justice was not ***1306** laying down specific mandatory requirements of EU law with which national legislation must comply, but was simply identifying and describing protections that were absent from the harmonised EU regime.

60 Nevertheless, considering that the answers to those questions of EU law were not clear and were necessary in order for it to give judgment in the proceedings, the Court of Appeal decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

"(1) Does the judgment of the Court of Justice in the Digital Rights Ireland case (including, in particular, paras 60 –62 thereof) lay down mandatory requirements of EU law applicable to a member state's domestic regime governing access to data retained in accordance with national legislation, in order to comply with articles 7 and 8 of the [Charter]?"

"(2) Does the judgment of the Court of Justice in the Digital Rights Ireland case expand the scope of articles 7 and/or 8 of the Charter beyond that of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as established in the jurisprudence of the European Court of Human Rights?"

IV— Procedure before the court

61 The requests for a preliminary ruling were registered at the Registry of the Court of Justice on 4 May 2015 (Case C-203/15) and 28 December 2015 (Case C-698/15).

62 By order of 1 February 2016, the court decided that Case C-698/15 should be dealt with under the expedited procedure provided for in article 105(1) of the Rules of Procedure of the Court of Justice .

63 In Case C-203/15 written observations were submitted by Tele2 Sverige, the Belgian, Czech, Danish, German, Estonian, Irish, Spanish, French, Hungarian, Netherlands, Swedish and United Kingdom Governments and the European Commission.

64 In Case C-698/15 written observations were submitted by Messrs Watson, Brice and Lewis, Open Rights Group, Privacy International, the Law Society, the Czech, Danish,

German, Estonian, Irish, French, Cypriot, Polish, Finnish and United Kingdom Governments and the European Commission.

65 By decision of the court of 10 March 2016, the two cases were joined for the purposes of the oral part of the procedure and the judgment.

66 The representatives of Tele2 Sverige, Messrs Watson, Brice and Lewis, Open Rights Group, Privacy International, the Law Society, the Czech, Danish, German, Estonian, Irish, Spanish, French, Finnish, Swedish and United Kingdom Governments and the European Commission attended the hearing, held on 12 April 2016, and presented oral argument.

V— Assessment of the questions referred for a preliminary ruling

67 By the first question referred in Case C-203/15, the national court asks the Court of Justice whether, in the light of the Digital Rights Ireland case, article 15(1) of Directive 2002/58 and articles 7, 8 and 52(1) of the Charter are to be interpreted as precluding member states from imposing on service providers a general obligation to retain data such as that at issue in ***1307** the main proceedings, regardless of any safeguards that might accompany such an obligation.

68 In the event that that question is answered in the negative, the second question referred in Case C-203/15 and the first question referred in Case C-698/15 seek to establish whether those provisions are to be interpreted as precluding member states from imposing on service providers a general data retention obligation where that obligation is not accompanied by all the safeguards laid down by the court in the Digital Rights Ireland case [2015] QB 127 , paras 60–68, in connection with access to the data, the period of retention and the protection and security of the data.

69 Since these three questions are closely interlinked, I shall examine them together in the assessment that follows.

70 On the other hand, the second question referred in Case C-698/15 must be addressed separately. By that question, the referring court asks the Court of Justice whether the Digital Rights Ireland case extended the scope of article 7 and/or article 8 of the Charter beyond that of article 8 of the Human Rights Convention . I shall set out in the following section the reasons for which I consider that this question must be rejected as inadmissible.

71 Before commencing my examination of the questions referred, I think it useful to set out again the types of data that are covered by the retention obligations at issue in the main proceedings. According to the information provided by the referring courts, the scope of the obligations at issue is essentially the same as that of the obligation which was provided for in article 5 of Directive 2006/24⁷ . The communications data covered by the retention obligations may be arranged schematically into four categories⁸ : data identifying both the source and the destination of communications; data identifying the location of both the source and the destination of communications; data relating to the date, time and duration of communications and data identifying the type of each communication and the type of equipment used.

72 The content of communications is excluded from the general data retention obligations at issue in the main proceedings, as was required by article 5(2) of Directive 2006/24 .

A— The admissibility of the second question referred in Case C-698/15

73 The second question referred in Case C-698/15 invites the court to clarify whether the Digital Rights Ireland case extended the scope of article 7 and/or article 8 of the Charter beyond that of article 8 of the Human Rights Convention , as interpreted by the Court of Human Rights.

74 That question reflects, in particular, an argument raised by the Home Secretary before the referring court, according to which the case law of the Court of Human Rights does not require that access to data should be subject to prior authorisation by an independent body or that the retention of such data and access to it must be confined to the sphere of fighting serious crime.

75 I think that this question must be rejected as inadmissible, for the following reasons. Clearly, the reasoning and the approach adopted by the court in the Digital Rights Ireland case are of crucial importance to the resolution of the disputes in the main proceedings. However, the fact that that judgment may possibly have extended the scope of article 7 and/or article 8 ***1308** of the Charter beyond that of article 8 of the Human Rights Convention is not in itself relevant to the resolution of those disputes.

76 It must be borne in mind in this connection that, in accordance with article 6(3) TEU of the EU Treaty , fundamental rights, as guaranteed by the Human Rights Convention , constitute general principles of EU law. However, as the European Union has not acceded to the Human Rights Convention , the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the European Union: Opinion 2/13 [2015] All ER (EC) 462 , para 179 and *N v Staatssecretaris voor Veiligheid en Justitie* (Case C-601/15PPU) [2016] 1 WLR 3027 , para 45 and the case law cited.

77 Admittedly, the first sentence of article 52(3) of the Charter lays down a rule of interpretation according to which, in so far as the Charter contains rights which correspond to rights guaranteed by the Human Rights Convention , “the meaning and scope of those rights [must] be the same as those laid down by the said Convention”.

78 However, according to the second sentence of article 52(3) of the Charter, “this provision [does] not prevent Union law providing more extensive protection”. To my mind, it is clear from that sentence that the court is entitled, if it regards it as necessary in the context of EU law, to extend the scope of the provisions of the Charter beyond that of the corresponding provisions of the Human Rights Convention .

79 I would add, as a subsidiary point, that article 8 of the Charter, which was interpreted by the court in the Digital Rights Ireland case, establishes a right that does not correspond to any right guaranteed by the Human Rights Convention , namely the right to the protection of personal data, as is confirmed, moreover, by the explanations relating to article 52 of the Charter ⁹ . Thus, the rule of interpretation laid down in the first sentence of article 52(3) of the Charter does not, in any event, apply to the interpretation of article 8 of the Charter, as

has been pointed out by Messrs Brice and Lewis, Open Rights Group, Privacy International, the Law Society and the Czech, Irish and Finnish Governments.

80 It follows from the foregoing that EU law does not preclude articles 7 and 8 of the Charter from providing more extensive protection than that provided for in the Human Rights Convention. Therefore, whether or not the Digital Rights Ireland case extended the scope of those provisions of the Charter beyond that of article 8 of the Human Rights Convention is not, in itself, relevant to the resolution of the disputes in the main proceedings. The decision that is taken on these disputes will essentially depend on the circumstances under which a general data retention obligation may be regarded as consistent with article 15(1) of Directive 2002/58 and articles 7, 8 and 52(1) of the Charter, interpreted in the light of the Digital Rights Ireland case, which is precisely the subject of the three other questions referred in the present cases.

81 According to consistent case law, a reference from a national court may be refused only if it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it: see, inter alia, Volker und Markus Schecke GbR v Land Hessen (Bundesanstalt für Landwirtschaft und Ernährung, joint party) (Joined Cases C-92/09 and C-93/09) [2010] ECR I-11063; [2012] All ER (EC) 127, ***1309** para 40 and the case law cited and Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (Case C-571/10) [2013] All ER (EC) 125, para 42 and the case law cited.

82 In this instance, for the reasons which I have set out, the second question referred in Case C-698/15 seems to me to be of purely theoretical interest, in as much it would not be possible to glean from any answer to that question any factors necessary for an interpretation of EU law which the referring court might usefully apply in order to resolve, in accordance with that law, the dispute before it: see, inter alia, judgment in Rijkdienst voor Werknemeerspansioenen v Vlaeminck (Case C-132/81) [1982] ECR 2953, para 13; order in Abt v Hypo Real Estate Holding AG (Case C-194/10) EU:C:2011:182, paras 36 and 37 and the case law cited and judgment in Stoilov i Ko EOOD v Nachalnik na Mitnitsa Stolichna (Case C-180/12) EU:C:2013:693, para 46.

83 That being so, I consider that the question must be rejected as inadmissible, as Mr Watson, the Law Society and the Czech Government have rightly contended.

B— The compatibility of a general data retention obligation with the regime established by Directive 2002/58

84 In this section I shall address the question whether the member states are entitled to avail themselves of the possibility offered by article 15(1) of Directive 2002/58 in order to impose a general data retention obligation. I shall not, however, examine the particular requirements that must be observed by member states wishing to avail themselves of that possibility, since I shall analyse those amply in a later section: see points 126–262 below.

85 Indeed, Open Rights Group and Privacy International have argued that such an obligation would be inconsistent with the harmonised regime established by Directive 2002/58

regardless of whether or not it meets the requirements which arise from article 15(1) thereof, since it would completely undermine the substance of the rights and the regime established by that Directive.

86 Before that argument may be considered, it is necessary first to establish whether general data retention obligations fall within the scope of the Directive.

1. The inclusion of general data retention obligations within the scope of Directive 2002/58

87 None of the parties that have submitted observations to the court has disputed the fact that general data retention obligations, such as those at issue in the main proceedings, fall within the concept of the "processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the [Union]" for the purposes of article 3 of Directive 2002/58 .

88 However, the Czech, French, Polish and United Kingdom Governments have submitted that general data retention obligations fall within the ambit of the exclusion laid down in article 1(3) of Directive 2002/58 . First, the national provisions governing access to the data and its use by the police and judicial authorities of the member states relate to public security, defence and state security, or at least fall within the ambit of ***1310** criminal law. Secondly, the sole objective of retaining the data is to enable the police and judicial authorities to access it and use it. Therefore, data retention obligations are excluded from the scope of the Directive as a result of the aforementioned provision.

89 I am not convinced by that reasoning, for the following reasons.

90 First of all, the wording of article 15(1) of Directive 2002/58 confirms that retention obligations imposed by the member states fall within the scope of the Directive. Indeed, that provision states that "member states may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph". I think it difficult, to say the least, to maintain that retention obligations are excluded from the scope of the Directive when article 15(1) of the Directive governs the possibility of imposing such obligations.

91 In reality, as Messrs Watson, Brice and Lewis, the Belgian, Danish, German and Finnish Governments and the European Commission have argued, a general data retention obligation, such as those at issue in the main proceedings, is a measure implementing article 15(1) of Directive 2002/58 .

92 Secondly, the fact that provisions governing access may fall within the scope of the exclusion laid down in article 1(3) of Directive 2002/58 (see points 123–125 below) does not mean that retention obligations must also fall within the scope of that exclusion, and thus outside the scope of the Directive.

93 In this connection, the court has already had occasion to clarify that the activities mentioned in the first indent of article 3(2) of Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281 , p 31), the wording of which is equivalent to that of article 1(3) of Directive 2002/58 , are activities of the state or of state

authorities and unrelated to the fields of activity of individuals: Criminal proceedings against Lindqvist (Case C-101/01) [2004] QB 1014; [2003] ECR I-12971 , paras 43 and 44.

94 The retention obligations at issue in the main proceedings, however, are imposed on private operators and concern the private business of providing electronic communications services, as the European Commission has pointed out. Moreover, those obligations are imposed independently of any application for access on the part of the police or judicial authorities and, more generally, independently of any act on the part of state authorities relating to public security, defence, state security or criminal law.

95 Thirdly, the approach taken by the court in Ireland v European Parliament (Case C-301/06) [2009] ECR I-593; [2009] All ER (EC) 1181 confirms that general data retention obligations do not fall within the sphere of criminal law. Indeed, the court held that Directive 2006/24 , which established such an obligation, related not to criminal law but to the functioning of the internal market and that article 95EC of the EC Treaty (now article 114FEU of the FEU Treaty) was therefore the proper legal basis for the adoption of that Directive.

96 In reaching that conclusion, the court found, in particular, that the provisions of that Directive were essentially limited to the activities of service providers and did not govern access to data or the use thereof by the police or judicial authorities of the member states: Ireland v Parliament , para 80. I infer from that that provisions of national law which lay down a ***1311** similar retention obligation to that provided for in Directive 2006/24 do not fall within the sphere of criminal law either.

97 Having regard to the foregoing, I am of the opinion that general data retention obligations do not fall within the scope of the exclusion laid down in article 1(3) of Directive 2002/58 and thus fall within the scope of the Directive.

2. The possibility of derogating from the regime established by Directive 2002/58 in order to create a general data retention obligation

98 It now falls to be determined whether general data retention obligations are consistent with the regime established by Directive 2002/58 .

99 The question which therefore arises is whether the member states are entitled to avail themselves of the option provided by article 15(1) of Directive 2002/58 in order to impose a general data retention obligation.

100 Four arguments have been put forward against such a possibility, in particular by Open Rights Group and Privacy International.

101 According to the first argument, granting the member states power to impose general data retention obligations would undermine the harmonisation objective which is the very purpose of Directive 2002/58 . Indeed, according to article 1(1) thereof, that Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Union.

102 Article 15(1) of Directive 2002/58 , it is alleged, cannot therefore be interpreted as giving the member states power to adopt a derogation from the regime established by that Directive that is so broad as to deprive this endeavour to achieve harmonisation of all practical effect.

103 According to the second argument, the wording of article 15(1) of Directive 2002/58 also militates against such a broad conception of the member states' power to derogate from the regime established by that Directive. That provision states that "member states may adopt legislative measures to *restrict the scope* of the rights and obligations provided for in article 5, article 6, article 8(1)(2)(3)(4), and article 9 of [the] Directive" (my italics).

104 However, a general data retention obligation would not merely "restrict the scope" of the rights and obligations mentioned in that provision, it would in fact nullify them. That applies to: the duty to ensure the confidentiality of traffic data and the duty to ensure that the storage of information is subject to the agreement of the user, provided for in article 5(1)(3) of Directive 2002/58 respectively; the duty to erase traffic data or make it anonymous, provided for in article 6(1) of that Directive; and the duty to make location data anonymous or to obtain the consent of the user in order for it to be processed, which is imposed by article 9(1) of the Directive.

105 It seems to me that these first two arguments must be rejected, for the following reasons.

106 First of all, the wording of article 15(1) of Directive 2002/58 refers to the member states' entitlement to adopt "legislative measures providing for the retention of data for a limited period". That express reference to data ***1312** retention obligations confirms that such obligations are not in themselves inconsistent with the regime established by Directive 2002/58 . Although the form of words used does not expressly provide for the possibility of imposing *general* data retention obligations, it must be observed that it does not preclude that possibility either.

107 Secondly, recital (11) of Directive 2002/58 states that the Directive does not alter

"the existing balance between the individual's right to privacy and the possibility for member states to take the measures referred to in article 15(1) of [the] Directive, necessary for the protection of public security, defence, state security (including the economic well-being of the state when the activities relate to state security matters) and the enforcement of criminal law."

Consequently, "[the] Directive does not affect the ability of member states to carry out lawful interception of electronic communications, or take other measures, if necessary for any of these purposes and in accordance with the [Human Rights Convention]".

108 It follows, in my opinion, from recital (11) that the intention of the EU legislature was not to affect the member state's right to adopt the measures referred to in article 15(1) of Directive 2002/58 , but to make that entitlement subject to certain requirements relating, in particular, to the aims pursued and the proportionality of the measures. In other words,

general data retention obligations are not, in my view, inconsistent with the regime established by the Directive, provided that they satisfy certain conditions.

109 According to the third argument, article 15(1) of Directive 2002/58 should, as a derogation from the regime established by that Directive, be interpreted strictly, in accordance with the rule of interpretation laid down in the consistent case law of the court. That requirement of strict interpretation precludes the interpretation of that provision as offering the possibility of adopting a general data retention obligation.

110 To my mind, the option provided for in article 15(1) of Directive 2002/58 cannot be classified as a derogation, and consequently should not be interpreted strictly, as the European Commission has rightly argued. Indeed, I think it difficult to classify that option as a derogation, given that recital (11) of the Directive, which I have just mentioned, states that the Directive does not affect the member states' entitlement to adopt the measures referred to in article 15(1). I would also point out that article 15 of the Directive is headed "Application of certain provisions of Directive [95/46]", while article 10 thereof is entitled "Exceptions" ("Dérogations" in the French-language version). Those headings persuade me that the option referred to in article 15 cannot be classified as a "derogation".

111 According to the fourth and last argument, the fact that a general data retention obligation is inconsistent with the regime established by Directive 2002/58 is borne out by the insertion of a new article 15(1a) into that Directive by Directive 2006/24, which was held to be invalid in the Digital Rights Ireland case. It is argued that it was this incompatibility that led the EU legislature to declare that article 15(1) of Directive 2002/58 did not apply to the general retention regime established by Directive 2006/24.

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112 This argument appears to me to be based on a misapprehension of the effect of article 15(1a) of Directive 2002/58. According to that provision, article 15(1) of Directive 2002/58 "shall not apply to data specifically required by Directive [2006/24] to be retained for the purposes referred to in article 1(1) of that Directive".

113 My reading of that provision is as follows. In so far as concerns data required to be retained pursuant to Directive 2006/24 for the purposes laid down in that Directive, the member states no longer had the option, provided for in article 15(1) of Directive 2002/58, to restrict further the scope of the rights and obligations referred to in that provision, in particular by the imposition of additional data retention obligations. In other words, article 15(1a) provided for exhaustive harmonisation as regards the data required to be retained pursuant to Directive 2006/24 for the purposes laid down in that Directive.

114 I find confirmation of that interpretation in recital (12) of Directive 2006/24, which states:

"Article 15(1) of Directive [2002/58] *continues to apply* to data, including data relating to unsuccessful call attempts, the retention of which is not specifically required under this Directive and *which therefore fall outside the scope thereof* ,

and to retention *for purposes* , including judicial purposes, *other than those covered by this Directive .*" (My italics.)

115 Thus, the insertion of article 15(1a) of Directive 2002/58 attests not to the fact that general retention obligations are inconsistent with the regime established by that Directive, but to the EU legislature's intention, when adopting Directive 2006/24 , to bring about an exhaustive harmonisation.

116 In light of the foregoing, I consider that general data retention obligations are consistent with the regime established by Directive 2002/58 and that member states are therefore entitled to avail themselves of the possibility offered by article 15(1) of that Directive in order to impose a general data retention obligation ¹⁰ . Recourse to that option is, however, subject to compliance with strict requirements which flow not only from article 15(1) but also from the relevant provisions of the Charter, read in the light of the Digital Rights Ireland case, which I shall examine later on: see points 126–262 below.

C— The applicability of the Charter to general data retention obligations

117 Before considering the content of the requirements that are imposed by the Charter, together with article 15(1) of Directive 2002/58 , where a member state chooses to introduce a general data retention obligation, it is necessary to establish that the Charter is indeed applicable to such an obligation.

118 The applicability of the Charter to general data retention obligations depends essentially on the applicability of Directive 2002/58 to such obligations.

119 Indeed, in accordance with the first sentence of article 51(1) of the Charter, "the provisions of [the] Charter are addressed to the ... member states only when they are implementing Union law". The explanations relating to article 51 of the Charter refer, in this connection, to the case law of the Court of Justice, according to which the obligation to observe the ***1314** fundamental rights defined in the Union is binding on the member states only when they are acting within the scope of application of EU law ¹¹ .

120 The Czech, French, Polish and United Kingdom Governments, which dispute the applicability of Directive 2002/58 to general data retention obligations (see point 88 above), have also submitted that the Charter is not applicable to such obligations.

121 I have already set out the reasons for which I consider that a general data retention obligation constitutes a measure implementing the option provided for in article 15(1) of Directive 2002/58 : see points 90–97 above.

122 Consequently, I consider that the provisions of the Charter are applicable to national measures introducing such an obligation, in accordance with article 51(1) of the Charter, as Messrs Watson, Brice and Lewis, Open Rights Group and Privacy International, the Danish, German and Finnish Governments and the European Commission have argued ¹² .

123 That conclusion is not called into question by the fact that national provisions governing access to retained data do not, as such, fall within the scope of application of the Charter.

124 Admittedly, to the extent that they concern "activities of the state in areas of criminal law", national provisions governing the access of police and judicial authorities to retained data for the purpose of fighting serious crime fall, in my opinion, within the scope of the exclusion laid down in article 1(3) of Directive 2002/58 : on the scope of this exclusion, see points 90–97 above. Consequently, national provisions of that kind do not implement EU law and the Charter therefore does not apply to them.

125 Nevertheless, the *raison d'être* of a data retention obligation is to enable law enforcement authorities to access the data retained, and so the issue of the retention of data cannot be entirely separated from the issue of access to that data. As the European Commission has rightly emphasised, provisions governing access are of decisive importance when assessing the compatibility with the Charter of provisions introducing a general data retention obligation in implementation of article 15(1) of Directive 2002/58 . More precisely, provisions governing access must be taken into account in the assessment of the necessity and proportionality of such an obligation: see points 185–262 below.

D— The compatibility of a general data retention obligation with the requirements laid down in article 15(1) of Directive 2002/58 and articles 7, 8 and 52(1) of the Charter

126 It now remains for me to tackle the difficult question of whether a general data retention obligation is compatible with the requirements laid down in article 15(1) of Directive 2002/58 and articles 7, 8 and 52(1) of the Charter, read in the light of the Digital Rights Ireland case. That question raises the broader issue of the necessary adaptation of existing laws circumscribing the capacity of states to conduct surveillance, a capacity which has increased significantly with recent advancements in technology ¹³ .

127 The first step in any analysis of this question is a finding of interference with the rights enshrined in Directive 2002/58 and in the fundamental rights enshrined in articles 7 and 8 of the Charter.

128 General data retention obligations are in fact a serious interference with the right to privacy, enshrined in article 7 of the Charter, and the right to the protection of personal data guaranteed by article 8 of the Charter. I think ***1315** it unnecessary to linger over that conclusion, which was clearly posited by the court in the Digital Rights Ireland case [2015] QB 127 , paras 32–37 ¹⁴ . Equally, general data retention obligations are an interference with several rights enshrined in Directive 2002/58 : see, on this point, the argument put forward by Open Rights Group and Privacy International, summarised in point 104 above.

129 The second step in the analysis is to establish whether, and if so on what conditions, such a serious interference with the rights enshrined in Directive 2002/58 and in articles 7 and 8 of the Charter may be justified.

130 Two provisions lay down conditions that must be satisfied in order for this twofold interference to be justified: article 15(1) of Directive 2002/58 , which circumscribes the right of member states to restrict the scope of certain rights established in that Directive, and article 52(1) of the Charter, read in the light of the Digital Rights Ireland case, which circumscribes all restrictions on the rights enshrined in the Charter.

131 I would emphasise that those requirements are *cumulative*. Compliance with the requirements laid down in article 15(1) of Directive 2002/58 does not in itself mean that the requirements laid down in article 52(1) of the Charter are also satisfied, and vice versa¹⁵. Consequently, a general data retention obligation may be regarded as consistent with EU law only if it complies with both the requirements laid down in article 15(1) of Directive 2002/58 and those laid down in article 52(1) of the Charter, as the Law Society has emphasised¹⁶.

132 Together, those two provisions establish six requirements that must be satisfied in order for the interference caused by a general data retention obligation to be justified: the retention obligation must have a legal basis; it must observe the essence of the rights enshrined in the Charter; it must pursue an objective of general interest; it must be appropriate for achieving that objective; it must be necessary in order to achieve that objective; and it must be proportionate, within a democratic society, to the pursuit of that same objective.

133 Several of those conditions were mentioned by the court in the Digital Rights Ireland case. For the sake of clarity and given the facts which distinguish the present cases from the Digital Rights Ireland case, I would nevertheless like to revisit each of them and examine in greater detail the requirements concerning the legal basis for, and the necessity and proportionality within a democratic society of general data retention obligations.

1. The requirement for a legal basis in national law

134 Both article 52(1) of the Charter and article 15(1) of Directive 2002/58 lay down requirements concerning the legal basis to which member states must have recourse when imposing a general data retention obligation.

135 First of all, any limitation on the exercise of the rights recognised by the Charter must, in accordance with article 52(1) of the Charter, be "provided for by law". That requirement was not formally examined by the court in the Digital Rights Ireland case, a case which concerned interference pursuant to a Directive.

136 Until its recent judgment in *WebMindLicenses Kft v Nemzeti Adó-és Vámhivatal Kiemelt Adó-és Vám Főigazgatóság* (Case C-419/14) [2016] 4 WLR 50, ***1316** the court had never given a ruling on the precise scope of this requirement, not even on those occasions when it expressly held that the requirement had been satisfied¹⁷ or had not been satisfied: *Knauf Gips KG v European Commission* (Case C-407/08P) [2010] 5 CMLR 12, paras 87–92 (interference having no legal basis). In para 81 of the aforementioned judgment, the Third Chamber of the court stated:

"In that regard, the requirement that any limitation on the exercise of that right must be provided for by law implies that the legal basis which permits the tax authorities to use the evidence referred to in the preceding paragraph must be sufficiently clear and precise and that, by defining itself the scope of the limitation on the exercise of the right guaranteed by article 7 of the Charter, it affords a measure of legal protection against any arbitrary interferences by those authorities ..."

137 I would invite the Grand Chamber of the court to confirm that interpretation in the present cases, for the following reasons.

138 As Advocate General Cruz Villalón rightly pointed out in his opinion in *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (Case C-70/10) EU:C:2011:255; [2011] ECR I-11959, points 94–100 the Court of Human Rights had developed a substantial body of case law on this requirement, with reference to the Human Rights Convention, according to which the term “law” must be understood in the substantive, rather than the formal sense of the term: see, in particular, *Sanoma Uitgevers BV v The Netherlands* (2010) 30 BHRC 318, para 83.

139 According to that body of case law, the expression “provided for by law” means that the legal basis must be adequately accessible and foreseeable, that is to say, formulated with sufficient precision to enable the individual—if need be with appropriate advice—to regulate his conduct. The legal basis must also provide adequate protection against arbitrary interference and, consequently, must define with sufficient clarity the scope and manner of exercise of the power conferred on the competent authorities (the principle of the supremacy of the law): see, in particular, *Leander v Sweden* (1987) 9 EHRR 433, paras 50 and 51; *Hassan v Bulgaria* CE:ECHR:2000:1026JUD003098596, para 84; *S v United Kingdom* (2008) 48 EHRR 50, para. 95; the *Sanoma Uitgevers* case, paras 81–83 and *Stoyanov v Bulgaria* EC:ECHR:2016:0331JUD005538810, paras 124–126.

140 In my view, the meaning of that expression “provided for by law” used in article 52(1) of the Charter needs to be the same as that ascribed to it in connection with the Human Rights Convention, for the following reasons.

141 First of all, pursuant to article 53 of the Charter and the explanations relating to that provision, the level of protection afforded by the Charter must never be inferior to that guaranteed by the Human Rights Convention. This rule that the “Human Rights Convention standard” must be attained means that the court’s interpretation of the expression “provided for by law” used in article 52(1) of the Charter must be at least as stringent as that given to it by the Court of Human Rights in connection with the Human Rights Convention¹⁸.

142 Secondly, in view of the horizontal nature of this requirement for a legal basis, which applies to a variety of types of interference, with reference ***1317** both to the Charter and to the Human Rights Convention¹⁹, it would be inappropriate to impose different criteria on the member states depending on which of those two instruments was under consideration²⁰.

143 I therefore think that, as the Estonian Government and the European Commission have argued, the expression “provided for by law” used in article 52(1) of the Charter must, in light of the case law of the Court of Human Rights referred to in point 139 above, be interpreted as meaning that general data retention obligations such as those at issue in the main proceedings must be founded on a legal basis that is adequately accessible and foreseeable and provides adequate protection against arbitrary interference.

144 Secondly, it is necessary to determine the content of the requirements laid down by article 15(1) of Directive 2002/58 concerning the legal basis to which member states must have recourse if they wish to avail themselves of the possibility offered by that provision.

145 I must, in this connection, point to certain differences between the various language versions of the first sentence of article 15(1) .

146 In the English ("legislative measures"), French ("mesures législatives"), Italian ("disposizioni legislative"), Portuguese ("medidas legislativas"), Romanian ("masuri legislative") and Swedish versions ("genom lagstiftning vidta åtgärder"), the first sentence of article 15(1) of Directive 2002/58 refers, in my opinion, to the adoption of measures emanating from a legislative authority.

147 On the other hand, the Danish ("retsfor skrifter"), German ("Rechtsvorschriften"), Dutch ("wettelijke maatregelen") and Spanish versions ("medidas legales") of that sentence may be interpreted as calling for the adoption either of measures emanating from a legislative authority or of regulatory measures emanating from an executive authority.

148 It is settled case law that the need for uniform application and, accordingly, for uniform interpretation of a European Union measure makes it impossible to consider one version of the text in isolation, but requires that the measure be interpreted on the basis of both the real intention of its author and the aim the latter seeks to achieve, in the light, in particular, of the versions existing in all the other official languages. Where there is divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part: see, inter alia, *Asbeek Brusse v Jahani BV* (Case C-488/11) [2013] HLR 38 , para 26; *Hotel Sava Rogaška, gostinstvo, turizem in storitve doo v Republic of Slovenia* (Case C-207/14) EU:C:2015:414, para 26 and *Christie's France SNC v Syndicat national des antiquaires* (Case C-41/14) [2015] ECDR 14 , para 26.

149 In this instance, article 15(1) of Directive 2002/58 governs the option available to the member states of derogating from the fundamental rights enshrined in articles 7 and 8 of the Charter, the protection of which is implemented in the Directive. I therefore regard it as appropriate to interpret the requirement for a legal basis imposed by article 15(1) of Directive 2002/58 in the light of the Charter, and in particular article 52(1) thereof.

150 Accordingly, it is imperative that the "measures" required by article 15(1) of Directive 2002/58 have the characteristics to which I referred in point 143 above, namely accessibility and foreseeability, and providing ***1318** adequate protection against arbitrary interference. It follows from those characteristics, and in particular from the requirement for adequate protection against arbitrary interference, that the measures must be *binding* on the national authorities upon which the power to access the retained data is conferred. It would not be sufficient, for example, if the safeguards surrounding access to data were provided for in codes of practice or internal guidelines having no binding effect, as the Law Society has rightly pointed out.

151 Moreover, the words "member states may adopt ... measures", which are common to all the language versions of the first sentence of article 15(1) of Directive 2002/58 , seem to me

to exclude the possibility of national case law, even settled case law, providing a sufficient legal basis for the implementation of that provision. I would emphasise that, in this respect, the provision is more stringent than the requirements arising from the case law of the Court of Human Rights ²¹.

152 I would add that, given the seriousness of the interference with the fundamental rights enshrined in articles 7 and 8 of the Charter that a general data retention obligation entails, it would appear desirable for the essential content of the regime in question, and in particular the safeguards surrounding the obligation, to be laid down in a measure adopted by the legislative authority and to leave the executive authority with responsibility for the detailed rules governing its implementation.

153 Having regard to the foregoing, I consider that article 15(1) of Directive 2002/58 and article 52(1) of the Charter must be interpreted as meaning that a regime establishing a general data retention obligation, such as those at issue in the main proceedings, must be established in legislative or regulatory measures possessing the characteristics of accessibility, foreseeability and adequate protection against arbitrary interference.

154 It is for the referring courts, which are in a privileged position to evaluate their respective national regimes, to verify compliance with that requirement.

2. Observance of the essence of the rights enshrined in articles 7 and 8 of the Charter

155 Article 52(1) of the Charter provides that any limitation on the exercise of the rights recognised by the Charter must "respect the essence of those rights and freedoms" ²². That aspect, which the court examined in the Digital Rights Ireland case [2015] QB 127, paras 39 and 40, with reference to Directive 2006/24, does not seem to me to raise any particular problem in the context of the present cases, as the Spanish and Irish Governments and the European Commission have submitted.

156 In the Digital Rights Ireland case, para 39, the court held that Directive 2006/24 did not adversely affect the essence of the right to privacy or of the other rights enshrined in article 7 of the Charter, since it did not permit the acquisition of knowledge of the content of the electronic communications as such.

157 In my view, that finding could equally apply to the national regimes at issue in the main proceedings, since they also do not permit the acquisition of knowledge of the content of the electronic communications as such: see the description of the national regimes at issue in the main proceedings given above, especially points 13 and 36.

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158 In the Digital Rights Ireland case, para 40, the court held that Directive 2006/24 did not adversely affect the essence of the fundamental right to the protection of personal data enshrined in article 8 of the Charter, given the principles of data protection and data security that had to be observed by service providers pursuant to article 7 of that Directive, with the member states being responsible for ensuring that appropriate technical and organisational

measures were adopted against accidental or unlawful destruction and accidental loss or alteration of the data.

159 Again, I consider that that finding could equally apply to the national regimes at issue in the main proceedings, since they too, it seems to me, provide for comparable safeguards in so far as concerns the protection and security of the data retained by service providers, in as much as those safeguards must effectively protect personal data against the risk of abuse and against any unlawful access and use of that data: the Digital Rights Ireland case, para 54; and see the description of the national regimes at issue in the main proceedings, at points 29–33, 45 and 46 above.

160 It is nevertheless for the referring courts to verify, in the light of the foregoing considerations, whether the national regimes at issue in the main proceedings do indeed observe the essence of the rights recognised in articles 7 and 8 of the Charter.

3. The existence of an objective of general interest recognised by the European Union that is capable of justifying a general data retention obligation

161 Both article 15(1) of Directive 2002/58 and article 52(1) of the Charter require that any interference with the rights enshrined in those instruments should be in the pursuit of an objective in the general interest.

162 In the Digital Rights Ireland case [2015] QB 127, paras 41–44, the court held that the general data retention obligation imposed by Directive 2006/24 contributed “to the fight against serious crime and thus, ultimately, to public security” and that the fight against serious crime was an objective of general interest to the European Union.

163 Indeed, it is clear from the case law of the court that the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest to the Union. The same may be said of the fight against serious crime in order to ensure public security. Furthermore, it should be noted, in this connection, that article 6 of the Charter lays down the right of any person not only to liberty, but also to security: the Digital Rights Ireland case, para 42 and the case law cited.

164 That observation applies equally to the general data retention obligations at issue in the main proceedings, which are liable to be justified by the objective of fighting serious crime.

165 Nevertheless, having regard to some of the arguments submitted to the court, it is necessary to determine whether such an obligation may also be justified by an objective in the general interest other than the fight against serious crime.

166 Article 52(1) of the Charter makes a general reference to “objectives of general interest recognised by the Union” and to “the need to protect the rights and freedoms of others”.

167 The wording of article 15(1) of Directive 2002/58 is more precise regarding the objectives which may justify interference with the rights laid ***1320** down in that Directive. In accordance with that provision, the measures in question must contribute to:

“[safeguarding] national security (ie state security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences

or of unauthorised use of the electronic communication system, as referred to in article 13(1) of [Directive 95/46] .”

168 In addition, in *Productores de Música de España (Promusicae) v Telefónica de España SAU* (Case C-275/06) [2008] ECR I-271; [2008] All ER (EC) 809 , paras 50 –54, the court held that that provision had to be interpreted in the light of article 13(1) of Directive 95/46 , which authorises derogations from the rights provided for in that Directive when they are justified by “the protection of the rights and freedoms of others”. Consequently, the court held that article 15(1) of Directive 2002/58 offered member states the possibility of laying down an obligation, for service providers, to disclose personal data so that it could be established, in the context of civil proceedings, whether there has been an infringement of copyright in musical or audiovisual recordings.

169 The United Kingdom Government has drawn from that judgment the argument that a general data retention obligation may be justified by any of the objectives mentioned in either article 15(1) of Directive 2002/58 or article 13(1) of Directive 95/46 . According to that government, such an obligation could be justified by the utility of retained data in combating “ordinary” (as opposed to “serious”) offences, or even in proceedings other than criminal proceedings, with regard to the objectives mentioned in those provisions.

170 I am not convinced by that argument, for the following reasons.

171 First of all, as Mr Watson and Open Rights Group and Privacy International have emphasised, the approach adopted by the court in the *Promusicae* case, is not relevant to the present cases, since that case concerned a request made by an organisation representing copyright holders for access to data retained spontaneously by a service provider, namely Telefónica de España. In other words, that judgment did not address the question of what objectives were capable of justifying the serious interference with fundamental rights which general data retention obligations, such as those at issue in the main proceedings, entail.

172 Secondly, I think that the requirement of proportionality within a democratic society prevents the combating of ordinary offences and the smooth conduct of proceedings other than criminal proceedings from constituting justifications for a general data retention obligation. The considerable risks that such obligations entail outweigh the benefits they offer in combating ordinary offences and in the conduct of proceedings other than criminal proceedings: see points 252–261 below.

173 In light of the foregoing, I consider that article 15(1) of Directive 2002/58 and article 52 (1) of the Charter must be interpreted as meaning that the fight against serious crime is an objective in the general interest that is capable of justifying a general data retention obligation, whereas combating ordinary offences and the smooth conduct of proceedings other than criminal proceedings are not.

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174 Consequently, it is necessary to assess the appropriateness, necessity and proportionality of such obligations with reference to the objective of fighting serious crime.

4. The appropriateness of general data retention obligations with regard to the fight against serious crime

175 The requirements of appropriateness, necessity (as regards necessity, see points 185–245 below) and proportionality (as regards proportionality, *stricto sensu*, see points 246–262 below) flow from both article 15(1) of Directive 2002/58 and article 52(1) of the Charter.

176 In accordance with the first of those requirements, general data retention obligations, such as those at issue in the main proceedings, must be liable to contribute to the objective of general interest that I have just identified, namely the fight against serious crime.

177 This requirement poses no particular difficulty in the present cases. Indeed, as the court stated, in substance, in the *Digital Rights Ireland* case [2015] QB 127, para 49, the data retained provide the national authorities having competence in criminal matters with an additional means of investigation to prevent or shed light on serious crime. Consequently, such obligations contribute to the fight against serious crime.

178 I would nevertheless like to be clear about the usefulness of general data retention obligations in the fight against serious crime. As the French Government has rightly pointed out, such obligations, by contrast with targeted surveillance measures, enable law enforcement authorities to “examine the past”, so to speak, by consulting retained data.

179 Targeted surveillance measures are focused on persons who have already been identified as being potentially connected, even indirectly or remotely, with a serious crime. Such targeted measures enable the competent authorities to access data relating to communications effected by such persons, and even to access the content of their communications. However, that access will be limited only to communications effected *after* the persons have been identified.

180 General data retention obligations, on the other hand, relate to all communications effected by all users, without requiring any connection whatsoever with a serious crime. Such obligations enable competent authorities to access the communications history of persons who have not yet been identified as being potentially connected with a serious crime. It is in this sense that general data retention obligations give law enforcement authorities a certain ability to examine the past, allowing them to access communications effected by such persons *before* they have been so identified²³.

181 In other words, the usefulness of general data retention obligations in the fight against serious crime lies in this limited ability to examine the past by consulting data that retraces the history of communications effected by persons even before they are suspected of being connected with a serious crime²⁴.

182 When presenting the proposal for a Directive which led to the adoption of Directive 2006/24, the European Commission illustrated this usefulness by giving several specific examples of investigations into terrorism, murder, kidnapping and child pornography²⁵.

183 Several similar examples have been given to the court in the present cases, in particular by the French Government, which has emphasised the positive obligation which member states are under to ensure the security of persons within their territory. According to that government, in the investigations aimed at dismantling the networks which organise the departure of French residents to conflict zones in Iraq and Syria, access to retained data plays a crucial role in identifying the people who facilitate those departures. The French Government adds that access to the communications data of persons who were involved in the recent terrorist attacks of January and November 2015 in France was extremely useful in helping the investigators discover the authors of those attacks and their accomplices. Similarly, in the search for missing persons, data relating to the location of such persons when effecting communications prior to their disappearance can play a crucial role in the investigation.

184 In light of the foregoing considerations, I think that general data retention obligations are liable to contribute to the fight against serious crime. It nevertheless remains to be verified whether such obligations are both necessary in order to achieve that objective and proportionate to the pursuit of that objective.

5. The necessity of general data retention obligations in the fight against serious crime

185 It is settled case law that a measure may be regarded as necessary only if no other measures exist that would be equally appropriate and less restrictive: see, *inter alia*, *Sky Österreich GmbH v Österreichischer Rundfunk* (Case C-283/11) [2013] All ER (EC) 633, paras 54–57; *Reindl v Bezirkshauptmannschaft Innsbruck* (Case C-443/13) EU:C:2014:2370, para 39 and *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (Nikolova, third parties)* (Case C-83/14) [2015] All ER (EC) 1083, paras 120–122²⁶.

186 The requirement of appropriateness calls for an evaluation of the “absolute” effectiveness—independently of any other possible measures—of a general data retention obligation in the fight against serious crime. The requirement of necessity calls for an assessment of the efficiency—or “relative” effectiveness of that obligation, that is to say, in comparison with all other possible measures²⁷.

187 In the present cases, the test of necessity demands an assessment of whether other measures could be as effective as a general data retention obligation in the fight against serious crime and whether such other measures would interfere to a lesser extent with the rights enshrined in Directive 2002/58 and articles 7 and 8 of the Charter²⁸.

188 I would also recall the settled case law, referred to in the *Digital Rights Ireland* case para 52, according to which the protection of the fundamental right to privacy requires that derogations and limitations in relation to the protection of personal data must apply only in so far as is “strictly necessary”: see, *inter alia*, the *Volker und Markus Schecke* case [2010] ECR I-11063, paras 77 and 86 and *Institut professionnel des agents immobiliers (IPI) v Englebert* (Case C-473/12) [2014] 2 CMLR 9, para 39.

189 Two issues relating to the requirement of strict necessity in the context of the present cases have been extensively debated by the parties that *1323 have submitted observations to the court. They correspond, in substance, to the two questions referred by the national court in Case C-203/15:

—first, in the light of the Digital Rights Ireland case [2015] QB 127 , paras 56 –59, should a general data retention obligation be regarded as, in itself, going beyond the bounds of what is strictly necessary for the purposes of fighting serious crime, irrespective of any safeguards that might accompany such an obligation?

—secondly, assuming that such an obligation may be regarded as not, in itself, going beyond the bounds of what is strictly necessary, must it be accompanied by all of the safeguards mentioned by the court in the Digital Rights Ireland case, paras 60 –68, so as to limit the interference with the rights enshrined in Directive 2002/58 and articles 7 and 8 of the Charter to what is strictly necessary?

190 Before addressing those issues, I think it appropriate to dismiss an argument put forward by the United Kingdom Government, according to which the criteria established in the Digital Rights Ireland case are irrelevant to the present cases because that case concerned not a national regime but a regime established by the EU legislature.

191 I would emphasise in this connection that, in the Digital Rights Ireland case, the court interpreted articles 7, 8 and 52(1) of the Charter and that those provisions are also the subject of the questions raised here in the main proceedings. In my opinion, it is not possible to interpret the provisions of the Charter differently depending on whether the regime under consideration was established at EU level or at national level, as Messrs Brice and Lewis and the Law Society have rightly emphasised. Once it has been established that the Charter is applicable, as it has been established in the present cases (see points 117–125 above), it must be applied in the same fashion regardless of the regime under consideration. Therefore, the criteria identified by the court in the Digital Rights Ireland case are relevant in the assessment of the national regimes at issue in the present cases, as the Danish and Irish Governments and the European Commission in particular have argued.

(a) The strict necessity of general data retention obligations

192 According to one view, propounded by Tele2 Sverige, Open Rights Group and Privacy International, general data retention obligations must, following the Digital Rights Ireland case, be regarded as, in themselves, going beyond the bounds of what is strictly necessary for the purposes of fighting serious crime, irrespective of any safeguards that might accompany such obligations.

193 According to the other view, propounded by the majority of the parties that have submitted observations to the court, such obligations do not go beyond the bounds of what is strictly necessary, provided that they are accompanied by certain safeguards concerning access to the data, the period of retention and the protection and security of the data.

194 The following reasons lead me to endorse the latter view.

195 First of all, my reading of the Digital Rights Ireland case is that the court held that a general data retention obligation goes beyond the bounds of what is strictly necessary where it is *not accompanied* by stringent safeguards concerning access to the data, the period of retention and the protection and security of the data. On the other hand, the court did *not* rule *1324 on the compatibility with EU law of general data retention obligations which *are accompanied* by such safeguards, in as much as that type of regime was not the subject of the questions referred to the court in that case.

196 I would emphasise in this connection that the Digital Rights Ireland case [2015] QB 127, paras 56 –59, contain no statement from the court to the effect that general data retention obligations in themselves go beyond what is strictly necessary.

197 In paras 56 and 57 of that judgment, the court noted that the retention obligation provided for by Directive 2006/24 covered all means of electronic communication, all users and all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting serious crime.

198 In paras 58 and 59 of the judgment, the court described in greater detail the practical implications of this absence of differentiation. First, the retention obligation even concerned persons for whom there was no evidence to suggest that their conduct might have a link, even an indirect or remote one, with serious crime. Secondly, the Directive did not require any relationship between the data whose retention was provided for and a threat to public security and, in particular, was not restricted to a retention in relation to data pertaining to a particular time period and/or a particular geographical area and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime.

199 The court therefore noted that general data retention obligations are characterised by their lack of differentiation by reference to the objective of fighting serious crime. It did *not*, however, hold that that absence of differentiation meant that such obligations, in themselves, went beyond what was strictly necessary.

200 In reality, it was only after completing its examination of the regime established by Directive 2006/24 and after noting the absence of certain safeguards which I shall come on to consider (see points 216–245 below)—that the court held, in the Digital Rights Ireland case [2015] QB 127, para 69:

" *Having regard to all the foregoing considerations* , it must be held that, by adopting Directive 2006/24 , the EU legislature has *exceeded the limits* imposed by compliance with the principle of proportionality in the light of articles 7, 8 and 52(1) of the Charter." (My italics.)

201 As the German and Netherlands Governments have argued, if a generalised data retention had, in and of itself, been sufficient to render Directive 2006/24 invalid, there would have been no need for the court to examine—as it did, in detail—the absence of the safeguards mentioned in paras 60 –68 of that judgment.

202 Therefore, the general data retention obligation provided for by Directive 2006/24 did not, in itself, go beyond what was strictly necessary. That Directive went beyond what was strictly necessary as a result of the *combined effect* of the generalised retention of data and the lack of safeguards aimed at limiting to what was strictly necessary the interference with the rights enshrined in articles 7 and 8 of the Charter. Because of that combined effect, it was necessary to declare the Directive invalid in its entirety: see the Digital Rights Ireland case, para 65²⁹.

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203 Secondly, I find confirmation for this interpretation in Schrems v Data Protection Comr (Case C-362/14) [2016] QB 527, para 93:

"Legislation is not limited to what is strictly necessary where it authorises, on a generalised basis, storage of all the personal data of all the persons whose data has been transferred from the European Union to the United States *without any* differentiation, limitation or exception being made in the light of the objective pursued *and without* an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data, and of its subsequent use, for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail: see, concerning Directive 2006/24, the Digital Rights Ireland case, paras 57–61." (My italics.)

204 Again, the court did not find that the regime at issue in that case went beyond the bounds of what was strictly necessary for the sole reason that it authorised the generalised retention of personal data. In that case, the bounds of what was strictly necessary had been overstepped because of the combined effect of the possibility of such generalised retention and the lack of a safeguard in relation to access aimed at reducing the interference to what was strictly necessary.

205 I infer from the foregoing that a general data retention obligation need not invariably be regarded as, in itself, going beyond the bounds of what is strictly necessary for the purposes of fighting serious crime. However, such an obligation will invariably go beyond the bounds of what is strictly necessary if it is not accompanied by safeguards concerning access to the data, the retention period and the protection and security of the data.

206 Thirdly, my feeling in this regard is corroborated by the need to verify, specifically, whether the requirement of strict necessity in the context of the national regimes at issue in the main proceedings has been observed.

207 As I stated in point 187 above, the requirement of strict necessity calls for an assessment of whether other measures could be as effective as a general data retention obligation in the fight against serious crime, while at the same time interfering to a lesser extent with the rights enshrined in Directive 2002/58 and articles 7 and 8 of the Charter.

208 That assessment must be carried out in the specific context of each national regime providing for a general data retention obligation. Moreover, it requires a comparison to be

made between the effectiveness of such an obligation and that of any other possible national measure, with account being taken of the fact that such obligations give the competent authorities a certain ability to examine the past by consulting the data: see points 178–183 above.

209 Given the requirement of strict necessity, it is imperative that national courts do not simply verify the mere utility of general data retention obligations, but rigorously verify that no other measure or combination of measures, such as a targeted data retention obligation accompanied by other investigatory tools, can be as effectiveness in the fight against serious crime. I would emphasise in this connection that several studies that have been brought to the court's attention call into question the necessity of this type of obligation in the fight against serious crime ³⁰.

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210 Moreover, assuming that other alternative measures could be as effective in the fight against serious crime, it will still remain for the referring courts, in accordance with the settled case law referred to in point 185 above, to determine whether those other measures would interfere with the fundamental rights at issue to a lesser extent than a general data retention obligation.

211 In the light of the Digital Rights Ireland case [2015] QB 127, para 59, it falls to the national courts to consider, in particular, whether it would be possible to limit the substantive scope of a retention obligation while at the same time preserving the effectiveness of such a measure in the fight against serious crime ³¹. Retention obligations may indeed have a greater or lesser substantive scope, depending on the users, geographic area and means of communication covered ³².

212 To my mind, it would be desirable, if the technology allowed, to exclude from the retention obligation data that is particularly sensitive in terms of the fundamental rights at issue in the main proceedings, such as data that is subject to professional privilege or data which makes it possible to identify a journalist's source.

213 Nevertheless, it is important to bear in mind that any substantial limitation of the scope of a general data retention obligation may considerably reduce the utility of such a regime in the fight against serious crime. For one reason, as several governments have emphasised, it is difficult, not to say impossible, to determine in advance what data may be connected with a serious crime. Therefore such a limitation could result in the exclusion from retention of data that might have proved relevant in the fight against serious crime.

214 For another reason, as the Estonian Government has pointed out, serious crime is an evolving phenomenon, one that is capable of adapting to the investigatory tools at the disposal of law enforcement authorities. Thus, a limitation to a particular geographic area or to a particular means of communication could result in the shifting of activities relating to serious crime to a geographic area and/or a means of communication not covered by the regime.

215 Since it calls for a complex appraisal of the national regimes at issue in the main proceedings, I consider that this assessment (of whether other measures could be as effective) must be carried out by the national courts, as the Czech, Estonian, Irish, French and Netherlands Governments and the European Commission have emphasised.

(b) The mandatory nature of the safeguards described by the court in the Digital Rights Ireland case, paras 60–68, in the light of the requirement of strict necessity

216 Assuming that a general data retention obligation may be regarded as strictly necessary in the context of the national regime in question, which is a matter for the national court to establish, it must still be determined whether that obligation must be accompanied by all the safeguards described by the court in the Digital Rights Ireland case [2015] QB 127, paras 60–68, with a view to limiting the interference with the rights enshrined in Directive 2002/58 and articles 7 and 8 of the Charter to what is strictly necessary.

217 The safeguards described concern the rules governing access to and use of the retained data by the competent authorities (the Digital Rights Ireland *1327 case, paras 60–62), the data retention period (paras 63 and 64) and the security and protection of the data retained by service providers (paras 66–68).

218 In the observations that have been submitted to the court, two opposing views have been put forward on the nature of these safeguards.

219 According to the first view, propounded by Messrs Watson, Brice and Lewis, Open Rights Group and Privacy International, the safeguards described by the court in the Digital Rights Ireland case, paras 60–68, are mandatory. According to this view, the court established minimum safeguards that must *all* be present under the national regime in question so as to limit the interference with fundamental rights to what is strictly necessary.

220 According to the second view, propounded by the German, Estonian, Irish, French and United Kingdom Governments, the safeguards described by the court in the Digital Rights Ireland case [2015] QB 127, paras 60–68, are merely illustrative. The court gave an “overall assessment” of the safeguards that were absent from the regime provided for by Directive 2006/24, but none of those safeguards, taken in isolation, may be regarded as mandatory in the light of the requirement of strict necessity. To illustrate this view, the German Government has suggested the metaphor of “communicating vessels”: a more flexible approach to one of the three aspects identified by the court (such as access to the retained data) may be compensated by a stricter approach to the other two aspects (the retention period and the security and protection of the data).

221 I am convinced that this “communicating vessels” argument must be rejected and that *all* the safeguards described by the court in the Digital Rights Ireland case, paras 60–68, must be regarded as mandatory, for the following reasons.

222 First of all, the language used by the court in its examination of the strict necessity of the regime laid down by Directive 2006/24 does not lend itself to such an interpretation. In particular, the court made no allusion, in paras 60–68 of the judgment, to any possibility of

"compensating" a more flexible approach to one of the three aspects it identified by a stricter approach to the remaining two.

223 It seems to me that, in reality, the "communicating vessels" argument arises from confusion between the requirement of necessity and the requirement of proportionality *stricto sensu*, which the court did not consider in the Digital Rights Ireland case. As I indicated in point 186 above, the requirement of necessity implies the rejection of any measure that is inefficient. In that context there can be no question of any "overall assessment", or of "compensation" or of "weighing up", which come into play only when proportionality *stricto sensu* is assessed ³³.

224 Secondly, this "communicating vessels" argument would deprive the safeguards described by the court in the Digital Rights Ireland case [2015] QB 127, paras 60-68, of any practical effect, such that persons whose data have been retained would no longer have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data, as is necessary, according to para 54 of that judgment.

225 The pernicious effect of the "communicating vessels" argument may be easily illustrated by the following examples. A national regime that ***1328** rigorously restricts access to the service of the fight against terrorism and limits the retention period to three months (representing a strict approach to access and retention period), but does not require service providers to retain the data, in encrypted form, within the national territory (representing a flexible approach to security), would expose the entire population to a significant risk of the retained data being accessed unlawfully. Similarly, a national regime that provided for a retention period of three months and the retention of the data in encrypted form within the national territory (representing a strict approach to retention period and security), but which allowed all employees of all public authorities access to the retained data (representing a flexible approach to access) would expose the entire population to a significant risk of abuse on the part of the national authorities.

226 To my mind, those examples show that, in order to preserve the practical effect of the safeguards described by the court in the Digital Rights Ireland case [2015] QB 127, paras 60-68, *each* of those safeguards must be regarded as mandatory. The Court of Human Rights also emphasised the fundamental importance of these safeguards in its recent judgment in Szabó v Hungary (2016) 63 EHRR 3, making express reference to the Digital Rights Ireland case ³⁴.

227 Thirdly, the implementation of these safeguards by those member states that wish to impose a general data retention obligation would not seem to me to pose any major practical difficulties. In reality, these safeguards seem to me in many respects quite "minimal", as Mr Watson has argued.

228 A number of these safeguards have been debated before the court because of their possible absence from the national regimes at issue in the main proceedings.

229 First, it is clear from the Digital Rights Ireland case, paras 61 and 62, that access to and the subsequent use of the retained data must be strictly restricted to the purpose of

preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating thereto.

230 According to Tele2 Sverige and the European Commission, that requirement is not satisfied by the Swedish regime at issue in Case C-203/15, which allows the retained data to be accessed for the purpose of combating ordinary offences. A similar criticism has been levelled by Messrs Brice, Lewis and Watson against the United Kingdom regime at issue in Case C-698/15, which authorises access for the purpose of combating ordinary offences, and even in the absence of any offence.

231 Whilst it is not for this court to reach a finding on the content of those national regimes, it falls within its remit to identify the objectives in the general interest that are capable of justifying serious interference with the rights enshrined in the Directive and in articles 7 and 8 of the Charter. I have already set out the reasons for which I consider that *only* the fight against serious crime is capable of justifying such interference: see points 170–173 above.

232 Secondly, according to the Digital Rights Ireland case [2015] QB 127, para 62, access to the data retained must be made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued. That ***1329** prior review must also intervene following a reasoned request of the competent national authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions.

233 According to the observations of Tele2 Sverige and the European Commission, that safeguard of an independent review preceding access is partly absent from the Swedish regime at issue in Case C-203/15. The same observation, the veracity of which has not been disputed by the United Kingdom Government, has been made by Messrs Brice, Lewis and Watson and by Open Rights Group and Privacy International with regard to the United Kingdom regime at issue in Case C-698/15.

234 I see no reason to take a flexible attitude to this requirement for prior review by an independent body, which indisputably emerges from the language used by the court in the Digital Rights Ireland case, para 62 ³⁵. First of all, such a requirement is dictated by the severity of the interference and of the risks engendered by the establishment of databases covering practically the whole of the population in question: see points 252–261 below. I would note that several experts in the protection of human rights while countering terrorism have criticised the current trend of replacing traditional independent authorisation procedures and effective oversight with “self-authorisation” systems for giving intelligence and police services access to data ³⁶.

235 Next, independent review preceding access to data is necessary so that data that is particularly sensitive in terms of the fundamental rights at issue in the main proceedings, such as data that is subject to professional privilege or data which makes it possible to identify a journalist's source, may be dealt with on a case-by-case basis, as indeed the Law Society and the French and German Governments have pointed out. Review preceding access

is all the more necessary where it is technically difficult to exclude all data of this kind from retention: see point 212 above ³⁷ .

236 Lastly, I would add that, from a practical point of view, none of the three parties concerned by a request for access is in a position to carry out an effective review in connection with access to the retained data. Competent law enforcement authorities have every interest in requesting the broadest possible access. Service providers, who will be ignorant of the content of any investigation file, are incapable of checking that requests for access are limited to what is strictly necessary and persons whose data are consulted have no way of knowing that they are under investigation, even if their data is used abusively or unlawfully, as Messrs Watson, Brice and Lewis have emphasised. Given the nature of the various interests involved, the intervention of an independent body prior to the consultation of retained data, with a view to protecting persons whose data are retained from abusive access by the competent authorities, is to my mind imperative.

237 Having said that, it seems reasonable to me to consider that, in specific situations of extreme urgency, such as the United Kingdom Government has referred to, there may be justification for law enforcement authorities to have immediate access to retained data, without any prior review, in order to prevent the commission of a serious crime or so that the perpetrators can be prosecuted: see the mechanism described in point 22 above ³⁸ . As far as possible, it is vital that the requirement for prior authorisation be maintained and an emergency procedure introduced within the independent authority in order to deal with this type of request for ***1330** access. Nevertheless, if it appears that making an application for access to an independent body is incompatible with the extreme urgency of the situation, there must be an ex post facto review by that body of access to and use of the data and it must be carried out as swiftly as possible.

238 Thirdly, in the Digital Rights Ireland case [2015] QB 127 , para 68, the court established that service providers are under an obligation to retain data within the European Union, in order to facilitate the review, required by article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security referred to in paras 66 and 67 of that judgment.

239 Tele2 Sverige and the European Commission have argued that the retention of data within the national territory is not guaranteed under the Swedish regime at issue in Case C-203/15. The same criticism has been levelled by Messrs Brice, Lewis and Watson against the United Kingdom regime at issue in Case C-698/15.

240 On this point, first of all, I see no reason to attenuate this requirement, established in the Digital Rights Ireland case, para 68, since, if data is retained outside the European Union, the level of protection offered by Directive 2002/58 and articles 7, 8 and 52(1) of the Charter cannot be ensured for persons whose data are retained: see Schrems' case.

241 Secondly, it seems reasonable to me to transpose this requirement, which the court expressed with reference to Directive 2006/24 , to national regimes and to provide for the retention of data within the national territory, as the German and French Governments and the European Commission have submitted. Indeed, in accordance with article 8(3) of the

Charter, every member state must ensure that an independent authority reviews compliance with the requirements of protection and security on the part of the service providers to which their national regimes apply. In the absence of co-ordination throughout the European Union, however, those national authorities might find it impossible to fulfil their supervisory duties in other member states.

242 Fourthly, in so far as the retention period is concerned, the referring courts must apply the criteria defined by the court in the Digital Rights Ireland case [2015] QB 127, paras 63 and 64. They must determine whether the retained data may be distinguished on the basis of their usefulness and, if so, whether the retention period is adjusted on the basis of that criterion. The referring courts must also check whether the retention period is based on objective criteria such that it may be ensured that it is limited to what is strictly necessary.

243 I would emphasise that, in its recent judgment in *Zakharov v Russia* (2015) 39 BHRC 435, paras 254 and 255 the Court of Human Rights held a maximum retention period of six months to be reasonable, while at the same time deploring the lack of any requirement to destroy immediately any data that are not relevant to the purpose for which they have been obtained³⁹. I would add, in this connection, that the national regimes at issue in the main proceedings must lay down an obligation to destroy definitively any retained data once it is no longer strictly necessary in the fight against serious crime. That obligation must be observed not only by service providers that retain data, but also by the authorities that have accessed the retained data.

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244 Having regard to the foregoing considerations, I consider that all the guarantees described by the court in the Digital Rights Ireland case, paras 60–68, are mandatory and consequently must accompany any general data retention obligation in order to limit the interference with the rights enshrined in Directive 2002/58 and articles 7 and 8 of the Charter to what is strictly necessary.

245 It is for the referring courts to check that the national regimes at issue in the main proceedings include each of these safeguards.

6. The proportionality, within a democratic society, of a general data retention obligation in the light of the fight against serious crime

246 Having verified the necessity of the national regimes at issue in the main proceedings, it will still remain for the referring courts to verify their proportionality, within a democratic society, with reference to the fight against serious crime. This aspect was not examined by the court in the Digital Rights Ireland case, since the regime established by Directive 2006/24 went beyond the bounds of what was strictly necessary for the purposes of fighting serious crime.

247 This requirement of proportionality within a democratic society—or proportionality *stricto sensu*—flows both from article 15(1) of Directive 2002/58 and article 52(1) of the Charter, as well as from settled case law: it has been consistently held that a measure which interferes

with fundamental rights may be regarded as proportionate only if the disadvantages caused are not disproportionate to the aims pursued ⁴⁰.

248 By contrast with the requirements relating to the appropriateness and necessity of the measure in question, which call for an evaluation of the measure's effectiveness in terms of the objective pursued, the requirement of proportionality *stricto sensu* implies weighing the advantages resulting from the measure in terms of the legitimate objective pursued against the disadvantages it causes in terms of the fundamental rights enshrined in a democratic society ⁴¹. This particular requirement therefore opens a debate about the values that must prevail in a democratic society and, ultimately, about what kind of society we wish to live in ⁴².

249 Consequently, as I indicated in point 223 above, it is at the stage when proportionality in the strict sense is considered that it becomes necessary to conduct an overall assessment of the regime in question, and not when the necessity of that measure is examined, as the partisans of the "communicating vessels" theory have argued ⁴³.

250 In accordance with the case law referred to in point 247 above, it is necessary to weigh in the balance the advantages and disadvantages, in a democratic society, of general data retention obligations. These advantages and disadvantages are intimately linked to the essential characteristic of such obligations—of which they reflect the positive and negative aspects—which is that they relate to all communications effected by all users irrespective of any connection whatsoever with a serious crime.

251 I have already set out, in points 178–183 above, the advantages which the retention of data relating to all communications effected within the national territory procure in the fight against serious crime.

252 The disadvantages of general data retention obligations arise from the fact that the vast majority of the data retained will relate to persons who will never be connected in any way with serious crime. It is important, in ***1332** this connection, to clarify the nature of the disadvantages which those people will suffer. They are, in fact, different in nature depending on the degree of interference in the fundamental rights of those individuals to privacy and the protection of personal data.

253 In so far as concerns "individual" interference, affecting a given individual, the disadvantages resulting from a general data retention obligation were very accurately described by Advocate General Cruz Villalón in his opinion in the Digital Rights Ireland case EU:C:2013:845; [2015] QB 127, points 72–74: see also the judgment at paras 27 and 37. In the words of Advocate General Cruz Villalón, the use of such data makes it possible "to create a both faithful and exhaustive map of a large portion of a person's conduct strictly forming part of his private life, or even a complete and accurate picture of his private identity".

254 In other words, in an individual context, a general data retention obligation will facilitate equally serious interference as targeted surveillance measures, including those which intercept the content of communications.

255 Whilst the severity of such individual interference should not be underestimated, it nevertheless seems to me that the specific risks engendered by a general data retention obligation become apparent in the context of "mass" interference.

256 Indeed, by contrast with targeted surveillance measures, a general data retention obligation is liable to facilitate considerably mass interference, that is to say interference affecting a substantial portion, or even all of the relevant population. This may be illustrated by the following examples.

257 Let us suppose, first of all, that a person who has access to retained data wishes to identify all the individuals in the member state who have a psychological disorder. Analysing the content of all communications effected within the national territory for that purpose would require considerable resources. On the other hand, by using databases of communications data, it would be possible instantly to identify all the individuals who have contacted a psychologist during the data retention period ⁴⁴. I might add that that technique could be extended to any of the fields of specialist medicine registered in a member state ⁴⁵.

258 Now let us suppose that that same person wished to identify individuals opposed to the policies of the incumbent government. Again, analysing the content of communications for that purpose would require considerable resources, whereas, by using communications data it would be possible to identify all individuals on the distribution list of e-mails criticising government policy. Furthermore, such data would also make it possible to identify individuals taking part in any public demonstration against the government ⁴⁶.

259 I would emphasise that the risks associated with access to communications data (or "metadata") may be as great or even greater than those arising from access to the content of communications, as has been pointed out by Open Rights Group, Privacy International and the Law Society, as well as in a recent report by the United Nations High Commissioner for Human Rights ⁴⁷. In particular, as the examples I have given demonstrate, "metadata" facilitate the almost instantaneous cataloguing of entire populations, something which the content of communications does not.

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260 I would add that there is nothing theoretical about the risks of abusive or illegal access to retained data. The risk of abusive access on the part of competent authorities must be put in the context of the extremely high number of requests for access to which reference has been made in the observations submitted to the court. In so far as the Swedish regime is concerned, Tele2 Sverige has stated that it was receiving approximately 10,000 requests monthly, a figure that does not include requests received by other service providers operating in Sweden. In so far as the United Kingdom regime is concerned, Mr Watson has reproduced a number of extracts from an official report which records 517,236 authorisations and 55,346 urgent oral authorisations for 2014 alone. The risk of illegal access, on the part of any person, is as substantial as the existence of computerised databases is extensive ⁴⁸.

261 In my view, it falls to the referring courts to determine, in accordance with the case law referred to in point 247 above, whether the disadvantages caused by the general data

retention obligations at issue in the main proceedings are not disproportionate, within a democratic society, to the objectives pursued. In carrying out that assessment, those courts must weigh the risks posed by such obligations against the advantages they offer, which are the following: the advantages associated with giving the authorities whose task it is to fight serious crime a certain ability to examine the past (see points 178–183 above), and the serious risks which, in a democratic society, arise from the power to catalogue the private lives of individuals and to catalogue a population in its entirety.

262 That assessment must take account of all the relevant characteristics of the national regimes at issue in the main proceedings. I would emphasise, in this connection, that the mandatory safeguards described by the court in the *Digital Rights Ireland* case, paras 60–68, are no more than minimum safeguards aimed at limiting the interference with the rights enshrined in Directive 2002/58 and articles 7 and 8 of the Charter to what is strictly necessary. Consequently, a national regime which includes all of those safeguards may nevertheless be considered disproportionate, within a democratic society, as a result of a lack of proportion between the serious risks engendered by such an obligation, in a democratic society, and the advantages it offers in the fight against serious crime.

VI— Conclusion

263 In light of the foregoing, I propose that the court's answer to the question referred for a preliminary ruling by the *Kammarrätten i Stockholm*, Sweden, and the Court of Appeal (England and Wales) should be as follows:

Article 15(1) of Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (“Directive on privacy and electronic communications”), as amended by Parliament and Council Directive 2009/136/EC of 25 November 2009, and articles 7, 8 and 52(1) of the Charter of Fundamental Rights of the European Union are to be interpreted as not precluding member states from imposing on providers of electronic communications services an obligation to retain all data relating to communications effected by the users of their services where all of the following conditions are satisfied, which it is for the referring courts to ***1334** determine in the light of all the relevant characteristics of the national regimes at issue in the main proceedings:

—the obligation and the safeguards which accompany it must be provided for in legislative or regulatory measures possessing the characteristics of accessibility, foreseeability and adequate protection against arbitrary interference;

—the obligation and the safeguards which accompany it must observe the essence of the rights recognised by articles 7 and 8 of the Charter of Fundamental Rights ;

—the obligation must be strictly necessary in the fight against serious crime, which means that no other measure or combination of measures could be as effective in the fight against serious crime while at the same time interfering to a lesser extent with the rights enshrined in Directive 2002/58 and articles 7 and 8 of the Charter of Fundamental Rights ;

—the obligation must be accompanied by all the safeguards described by the court in the Digital Rights Ireland case [2015] QB 127 , paras 60–68, concerning access to the data, the period of retention and the protection and security of the data, in order to limit the interference with the rights enshrined in Directive 2002/58 and articles 7 and 8 of the Charter of Fundamental Rights to what is strictly necessary; and

—the obligation must be proportionate, within a democratic society, to the objective of fighting serious crime, which means that the serious risks engendered by the obligation, in a democratic society, must not be disproportionate to the advantages which it offers in the fight against serious crime.

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21 December 2016. THE COURT (Grand Chamber)

delivered the following judgment.

1 These requests for a preliminary ruling concern the interpretation of article 15(1) of Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Directive on privacy and electronic communications) (OJ 2002 L201 , p 37), as amended by Parliament and Council Directive 2009/136/EC of 25 November 2009 (OJ 2009 L337 , p 11) (" Directive 2002/58 "), read in the light of articles 7 and 8 and article 52(1) of the Charter of Fundamental Rights of the European Union ("the Charter").

2 The requests have been made in two proceedings between (i) Tele2 Sverige AB and Post- och telestyrelsen (the Swedish Post and Telecom Authority) ("PTS"), concerning an order sent by PTS to Tele2 Sverige requiring the latter to retain traffic and location data in relation

to its subscribers and registered users (Case C-203/15), and (ii) Mr Tom Watson, Mr Peter Brice and Mr Geoffrey Lewis, on the one hand, and the Secretary of State for the Home Department (United Kingdom of Great Britain and Northern Ireland), on the other, concerning the conformity with European Union ("EU") law of section 1 of the Data Retention and Investigatory Powers Act 2014 (Case C-698/15).

Legal context

European Union ("EU") law

Directive 2002/58

3 Recitals (2), (6), (7), (11), (21), (22), (26) and (30) of Directive 2002/58 state:

"(2) This Directive seeks to respect the fundamental rights and observes the principles recognised in particular by [the Charter]. In particular, this Directive seeks to ensure full respect for the rights set out in articles 7 and 8 of that Charter."

"(6) The internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. Publicly available electronic communications services over the internet open new possibilities for users but also new risks for their personal data and privacy.

"(7) In the case of public communications networks, specific legal, regulatory and technical provisions should be made in order to protect fundamental rights and freedoms of natural persons and legitimate interests of legal persons, in particular with regard to the increasing capacity for automated storage and processing of data relating to subscribers and users."

"(11) Like Parliament and Council Directive 95/46/EC [of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281 , *1341 p 31)], this Directive does not address issues of protection of fundamental rights and freedoms related to activities which are not governed by Community law. Therefore it does not alter the existing balance between the individual's right to privacy and the possibility for member states to take the measures referred to in article 15(1) of this Directive, necessary for the protection of public security, defence, state security (including the economic well-being of the state when the activities relate to state security matters) and the enforcement of criminal law. Consequently, this Directive does not affect the ability of member states to carry out lawful interception of electronic communications, or take other measures, if necessary for any of these purposes and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms , as interpreted by the rulings of the European Court of Human Rights. Such measures must be appropriate, strictly proportionate to the intended purpose and necessary within a democratic society and should be

subject to adequate safeguards in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms ."

"(21) Measures should be taken to prevent unauthorised access to communications in order to protect the confidentiality of communications, including both the contents and any data related to such communications, by means of public communications networks and publicly available electronic communications services. National legislation in some member states only prohibits intentional unauthorised access to communications.

"(22) The prohibition of storage of communications and the related traffic data by persons other than the users or without their consent is not intended to prohibit any automatic, intermediate and transient storage of this information in so far as this takes place for the sole purpose of carrying out the transmission in the electronic communications network and provided that the information is not stored for any period longer than is necessary for the transmission and for traffic management purposes, and that during the period of storage the confidentiality remains guaranteed."

"(26) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons and concern the right to respect for their correspondence or concern the legitimate interests of legal persons. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data ... may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his/her consent to such processing."

"(30) Systems for the provision of electronic communications networks and services should be designed to limit the amount of personal data necessary to a strict minimum."

4 Article 1 of Directive 2002/58 , headed "Scope and aim", provides:

"1. This Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of ***1342** fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

"2. The provisions of this Directive particularise and complement Directive [95/46] for the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons.

"3. This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union , and in any case to activities concerning public security, defence, state security (including the economic well-being of the state when the activities relate to state security matters) and the activities of the state in areas of criminal law."

5 Article 2 of Directive 2002/58 , headed "Definitions", provides:

"Save as otherwise provided, the definitions in Directive [95/46] and in Parliament and Council Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [(OJ 2002 L108 , p 33)] shall apply. The following definitions shall also apply ... (b) 'traffic data' means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof; (c) 'location data' means any data processed in an electronic communications network or by an electronic communications service, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service; (d) 'communication' means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information; ..."

6 Article 3 of Directive 2002/58 , headed "Services concerned", provides:

"This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community, including public communications networks supporting data collection and identification devices."

7 Article 4 of that Directive, headed "Security of processing", is worded as follows:

"1. The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

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"1a. Without prejudice to Directive [95/46] , the measures referred to in paragraph 1 shall at least:—ensure that personal data can be accessed only by authorised personnel for legally authorised purposes,—protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or

disclosure, and,—ensure the implementation of a security policy with respect to the processing of personal data.”

8 Article 5 of Directive 2002/58 , headed “Confidentiality of the communications”, provides:

“1. Member states shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with article 15(1) . This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.”

“3. Member states shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive [95/46] , inter alia, about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.”

9 Article 6 of Directive 2002/58 , headed “Traffic data”, provides:

“1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this article and article 15(1) .

“2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

“3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services or marketing, if the subscriber or user to whom the data relate has given his or her prior consent. Users or subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time.”

"5. Processing of traffic data, in accordance with paragraphs 1, 2, 3 and 4, must be restricted to persons acting under the authority of providers of the public communications networks and publicly available electronic communications services handling billing or traffic management, customer inquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities."

10 Article 9(1) of that Directive, that article being headed "Location data other than traffic data", provides:

"Where location data other than traffic data, relating to users or subscribers of public communications networks or publicly available electronic communications services, can be processed, such data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data other than traffic data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service."

11 Article 15 of that Directive, headed "Application of certain provisions of Directive [95/46]", states:

"1. Member states may adopt legislative measures to restrict the scope of the rights and obligations provided for in article 5, article 6, article 8(1), (2), (3) and (4), and article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (ie state security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in article 13(1) of Directive [95/46] . To this end, member states may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in article 6(1) and (2) of the Treaty on European Union ."

"1b. Providers shall establish internal procedures for responding to requests for access to users' personal data based on national provisions adopted pursuant to paragraph 1. They shall provide the competent national authority, on demand, with information about those procedures, the number of requests received, the legal justification invoked and their response.

"2. The provisions of Chapter III on judicial remedies, liability and sanctions of Directive [95/46] shall apply with regard to national provisions adopted

pursuant to this Directive and with regard to the individual rights derived from this Directive."

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Directive 95/46

12 Article 22 of Directive 95/46 , which is in Chapter III of that Directive, is worded as follows:

"Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in article 28 , prior to referral to the judicial authority, member states shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question."

Parliament and Council Directive 2006/24/EC

13 Article 1(2) of Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L105 , p 54), that article being headed "Subject matter and scope", provided:

"This Directive shall apply to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network."

14 Article 3 of that Directive, headed "Obligation to retain data", provided:

"1. By way of derogation from articles 5, 6 and 9 of [Directive 2002/58] , member states shall adopt measures to ensure that the data specified in article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned.

"2. The obligation to retain data provided for in paragraph 1 shall include the retention of the data specified in article 5 relating to unsuccessful call attempts where those data are generated or processed, and stored (as regards telephony data) or logged (as regards Internet data), by providers of publicly available electronic communications services or of a public communications network within the jurisdiction of the member state concerned in the process of supplying the communication services concerned. This Directive shall not require data relating to unconnected calls to be retained."

Swedish law

15 It is apparent from the order for reference in Case C-203/15 that the Swedish legislature, in order to transpose Directive 2006/24 into national law, amended the lagen (2003:389) om elektronisk kommunikation [Law (2003:389) on electronic communications] ("the LEK") and the förordningen (2003:396) om elektronisk kommunikation [Regulation (2003:396) on electronic communications]. Both of those texts, in the versions applicable to the dispute in the main proceedings, contain rules on the retention of ***1346** electronic communications data and on access to that data by the national authorities.

16 Access to that data is, in addition, regulated by the lagen (2012:278) om inhämtning av uppgifter om elektronisk kommunikation i de brottsbekämpande myndigheternas underrättelseverksamhet (Law (2012:278) on gathering of data relating to electronic communications as part of intelligence gathering by law enforcement authorities: "Law 2012:278") and by the rättegångsbalken (Code of Judicial Procedure) ("the RB").

The obligation to retain electronic communications data

17 According to the information provided by the referring court in Case C-203/15, the provisions of paragraph 16a of Chapter 6 of the LEK, read together with paragraph 1 of Chapter 2 of that law, impose an obligation on providers of electronic communications services to retain data the retention of which was required by Directive 2006/24. The data concerned is that relating to subscriptions and all electronic communications necessary to trace and identify the source and destination of a communication; to determine its date, time, and type; to identify the communications equipment used and to establish the location of mobile communication equipment used at the start and end of each communication. The data which there is an obligation to retain is data generated or processed in the context of telephony services, telephony services which use a mobile connection, electronic messaging systems, internet access services and internet access capacity (connection mode) provision services. The obligation extends to data relating to unsuccessful communications. The obligation does not however extend to the content of communications.

18 Articles 38 to 43 of Regulation (2003:396) on electronic communications specify the categories of data that must be retained. As regards telephony services, there is the obligation to retain data relating to calls and numbers called and the identifiable dates and times of the start and end of the communication. As regards telephony services which use a mobile connection, additional obligations are imposed, covering, for example, the retention of location data at the start and end of the communication. As regards telephony services using an IP packet, data to be retained includes, in addition to data mentioned above, data relating to the IP addresses of the caller and the person called. As regards electronic messaging systems, data to be retained includes data relating to the numbers of senders and recipients, IP addresses or other messaging addresses. As regards internet access services, data to be retained includes, for example, data relating to the IP addresses of users and the traceable dates and times of logging into and out of the internet access service.

Data retention period

19 In accordance with paragraph 16d of Chapter 6 of the LEK, the data covered by paragraph 16a of that Chapter must be retained by the providers of electronic communications services

for six months from the date of the end of communication. The data must then be immediately erased, unless otherwise provided in the second sub-paragraph of paragraph 16d of that Chapter.

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Access to retained data

20 Access to retained data by the national authorities is governed by the provisions of Law 2012:278, the LEK and the RB.

Law 2012:278

21 In the context of intelligence gathering, the national police, the Säkerhetspolisen (the Swedish Security Service), and the Tullverket (the Swedish Customs Authority) may, on the basis of paragraph 1 of Law 2012:278, on the conditions prescribed by that law and without informing the provider of an electronic communications network or a provider of an electronic communications service authorised under the LEK, undertake the collection of data relating to messages transmitted by an electronic communications network, the electronic communications equipment located in a specified geographical area and the geographical areas(s) where electronic communications equipment is or was located.

22 In accordance with paragraphs 2 and 3 of Law 2012:278, data may, as a general rule, be collected if, depending on the circumstances, the measure is particularly necessary in order to avert, prevent or detect criminal activity involving one or more offences punishable by a term of imprisonment of at least two years, or one of the acts listed in paragraph 3 of that law, referring to offences punishable by a term of imprisonment of less than two years. Any grounds supporting that measure must outweigh considerations relating to the harm or prejudice that may be caused to the person affected by that measure or to an interest opposing that measure. In accordance with paragraph 5 of that law, the duration of the measure must not exceed one month.

23 The decision to implement such a measure is to be taken by the director of the authority concerned or by a person to whom that responsibility is delegated. The decision is not subject to prior review by a judicial authority or an independent administrative authority.

24 Under paragraph 6 of Law 2012:278, the Säkerhets och integritetsskyddsnämnden (the Swedish Commission on Security and Integrity Protection) must be informed of any decision authorising the collection of data. In accordance with paragraph 1 of Lagen (2007:980) om tillsyn över viss brottsbekämpande verksamhet (Law (2007:980) on the supervision of certain law enforcement activities), that authority is to oversee the application of the legislation by the law enforcement authorities.

The LEK

25 Under paragraph 22, first sub-paragraph, point 2, of Chapter 6 of the LEK, all providers of electronic communications services must disclose data relating to a subscription at the request of the prosecution authority, the national police, the Security Service or any other public law enforcement authority, if that data is connected with a presumed criminal offence.

On the information provided by the referring court in Case C-203/15, it is not necessary that the offence be a serious crime.

The RB

26 The RB governs the disclosure of retained data to the national authorities within the framework of preliminary investigations. In accordance ***1348** with paragraph 19 of Chapter 27 of the RB, "placing electronic communications under surveillance" without the knowledge of third parties is, as a general rule, permitted within the framework of preliminary investigations that relate to, inter alia, offences punishable by a sentence of imprisonment of at least six months. The expression "placing electronic communications under surveillance", under paragraph 19 of Chapter 27 of the RB, means obtaining data without the knowledge of third parties that relates to a message transmitted by an electronic communications network, the electronic communications equipment located or having been located in a specific geographical area, and the geographical area(s) where specific electronic communications equipment is or has been located.

27 According to what is stated by the referring court in Case C-203/15, information on the content of a message may not be obtained on the basis of paragraph 19 of Chapter 27 of the RB. As a general rule, placing electronic communications under surveillance may be ordered, under paragraph 20 of Chapter 27 of the RB, only where there are reasonable grounds for suspicion that an individual has committed an offence and that the measure is particularly necessary for the purposes of the investigation: the subject of that investigation must moreover be an offence punishable by a sentence of imprisonment of at least two years, or attempts, preparation or conspiracy to commit such an offence. In accordance with paragraph 21 of Chapter 27 of the RB, the prosecutor must, other than in cases of urgency, request from the court with jurisdiction authority to place electronic communications under surveillance.

The security and protection of retained data

28 Under paragraph 3a of Chapter 6 of the LEK, providers of electronic communications services who are subject to an obligation to retain data must take appropriate technical and organisational measures to ensure the protection of data during processing. On the information provided by the referring court in Case C-203/15, Swedish law does not, however, make any provision as to where the data is to be retained.

United Kingdom law

The Data Retention and Investigatory Powers Act 2014

29 Section 1 of the 2014 Act, headed "Powers for retention of relevant communications data subject to safeguards", provides:

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"(1) The Secretary of State may by notice (a 'retention notice') require a public telecommunications operator to retain relevant communications data if the Secretary of State considers that the requirement is necessary and

proportionate for one or more of the purposes falling within paragraphs (a) to (h) of section 22(2) of the Regulation of Investigatory Powers Act 2000 (purposes for which communications data may be obtained).

“(2) A retention notice may— (a) relate to a particular operator or any description of operators, (b) require the retention of all data or any description of data, (c) specify the period or periods for which data is to be retained, (d) contain other requirements, or restrictions, in relation to the retention of data, (e) make different provision for different purposes, (f) relate to data whether or not in existence at the time of the giving, or coming into force, of the notice.

“(3) The Secretary of State may by Regulations make further provision about the retention of relevant communications data.

“(4) Such provision may, in particular, include provision about— (a) requirements before giving a retention notice, (b) the maximum period for which data is to be retained under a retention notice, (c) the content, giving, coming into force, review, variation or revocation of a retention notice, (d) the integrity, security or protection of, access to, or the disclosure or destruction of, data retained by virtue of this section, (e) the enforcement of, or auditing compliance with, relevant requirements or restrictions, (f) a code of practice in relation to relevant requirements or restrictions or relevant power, (g) the reimbursement by the Secretary of State (with or without conditions) of expenses incurred by public telecommunications operators in complying with relevant requirements or restrictions, (h) the [Data Retention (EC Directive) Regulations 2009 (SI 2009/859)] ceasing to have effect and the transition to the retention of data by virtue of this section.

“(5) The maximum period provided for by virtue of subsection (4)(b) must not exceed 12 months beginning with such day as is specified in relation to the data concerned by Regulations under subsection (3).”

30 Section 2 of the 2014 Act defines the expression “relevant communications data” as meaning “communications data of the kind mentioned in the Schedule to the [Data Retention (EC Directive) Regulations 2009] so far as such data is generated or processed in the United Kingdom by public telecommunications operators in the process of supplying the telecommunications services concerned”.

The Regulation of Investigatory Powers Act 2000

31 Section 21(4) of the Regulation of Investigatory Powers Act 2000 , that section being in Chapter II of that act and headed “Acquisition and disclosure of communications data”, states:

“In this Chapter ‘communications data’ means any of the following— (a) any traffic data comprised in or attached to a communication (whether by the sender or otherwise) for the purposes of any postal service or telecommunication system by means of which it is being or may be transmitted;

(b) any information which includes none of the contents of a communication (apart from any information falling within paragraph (a)) and is about the use made by any person— (i) of any postal service or telecommunications service; or (ii) in connection with the provision to or use by any person of any telecommunications service, of any part of a telecommunication system; (c) any information not falling within paragraph (a) or (b) that is held or obtained, in relation to persons to whom he provides the service, by a person providing a postal service or telecommunications service.”

32 On the information provided in the order for reference in Case C-698/15, that data includes “user location data”, but not data relating to the content of a communication.

33 As regards access to retained data, section 22 of the 2000 Act provides:

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“(1) This section applies where a person designated for the purposes of this Chapter believes that it is necessary on grounds falling within subsection (2) to obtain any communications data.

“(2) It is necessary on grounds falling within this subsection to obtain communications data if it is necessary— (a) in the interests of national security; (b) for the purpose of preventing or detecting crime or of preventing disorder; (c) in the interests of the economic well-being of the United Kingdom; (d) in the interests of public safety; (e) for the purpose of protecting public health; (f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; (g) or the purpose, in an emergency, of preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health; or (h) or any purpose (not falling within paragraphs (a) to (g)) which is specified for the purposes of this subsection by an order made by the Secretary of State.”

“(4) Subject to subsection (5), where it appears to the designated person that a postal or telecommunications operator is or may be in possession of, or be capable of obtaining, any communications data, the designated person may, by notice to the postal or telecommunications operator, require the operator— (a) if the operator is not already in possession of the data, to obtain the data; and (b) in any case, to disclose all of the data in his possession or subsequently obtained by him.

“(5) The designated person shall not grant an authorisation under subsection (3), or give a notice under subsection (4), unless he believes that obtaining the data in question by the conduct authorised or required by the authorisation or notice is proportionate to what is sought to be achieved by so obtaining the data.”

34 Under section 65 of the 2000 Act, complaints may be made to the Investigatory Powers Tribunal (United Kingdom) if there is reason to believe that data has been acquired inappropriately.

The Data Retention Regulations 2014

35 The Data Retention Regulations 2014 (SI 2014/2042), adopted on the basis of the 2014 Act, are divided into three parts, Part 2 containing regulations 2 to 14 of that legislation. Regulation 4, headed "Retention notices", provides:

"(1) A retention notice must specify— (a) the public telecommunications operator (or description of operators) to whom it relates, (b) the relevant communications data which is to be retained, (c) the period or periods for which the data is to be retained, (d) any other requirements, or any restrictions, in relation to the retention of the data.

"(2) A retention notice must not require any data to be retained for more than 12 months beginning with— (a) in the case of traffic data or service use data, the day of the communication concerned, and (b) in the case of subscriber data, the day on which the person concerned leaves the telecommunications service concerned or (if earlier) the day on which the data is changed."

36 Regulation 7 of the 2014 Regulations, headed "Data integrity and security", provides:

"(1) A public telecommunications operator who retains communications data by virtue of section 1 of [the 2014 Act] must— ***1351** (a) secure that the data is of the same integrity and subject to at least the same security and protection as the data on any system from which it is derived, (b) secure, by appropriate technical and organisational measures, that the data can be accessed only by specially authorised personnel, and (c) protect, by appropriate technical and organisational measures, the data against accidental or unlawful destruction, accidental loss or alteration, or unauthorised or unlawful retention, processing, access or disclosure.

"(2) A public telecommunications operator who retains communications data by virtue of section 1 of [the 2014 Act] must destroy the data if the retention of the data ceases to be authorised by virtue of that section and is not otherwise authorised by law.

"(3) The requirement in paragraph (2) to destroy the data is a requirement to delete the data in such a way as to make access to the data impossible.

"(4) It is sufficient for the operator to make arrangements for the deletion of the data to take place at such monthly or shorter intervals as appear to the operator to be practicable."

37 Regulation 8 of the 2014 Regulations, headed "Disclosure of retained data", provides:

"(1) A public telecommunications operator must put in place adequate security systems (including technical and organisational measures) governing access to

communications data retained by virtue of section 1 of [the 2014 Act] in order to protect against any disclosure of a kind which does not fall within section 1(6) (a) of [the 2014 Act].

“(2) A public telecommunications operator who retains communications data by virtue of section 1 of [the 2014 Act] must retain the data in such a way that it can be transmitted without undue delay in response to requests.”

38 Regulation 9 of the 2014 Regulations, headed “Oversight by the Information Commissioner”, states: “The Information Commissioner must audit compliance with requirements or restrictions imposed by this Part in relation to the integrity, security or destruction of data retained by virtue of section 1 of [the 2014 Act].”

The Code of Practice

39 The Acquisition and Disclosure of Communications Data Code of Practice (“the Code of Practice”) contains, in paragraphs 2.5 to 2.9 and 2.36 to 2.45, guidance on the necessity for and proportionality of obtaining communications data. As explained by the referring court in Case C-698/15, particular attention must, in accordance with paragraphs 3.72 to 3.77 of that code, be paid to necessity and proportionality where the communications data sought relates to a person who is a member of a profession that handles privileged or otherwise confidential information.

40 Under paragraph 3.78 to 3.84 of that code, a court order is required in the specific case of an application for communications data that is made in order to identify a journalist's source. Under paragraphs 3.85 to 3.87 of that code, judicial approval is required when an application for access is made by local authorities. No authorisation, on the other hand, need be obtained from a court or any independent body with respect to access to ***1352** communications data protected by legal professional privilege or relating to doctors of medicine, Members of Parliament or ministers of religion.

41 Paragraph 7.1 of the Code of Practice provides that communications data acquired or obtained under the provisions of the 2000 Act, and all copies, extracts and summaries of that data, must be handled and stored securely. In additions, the requirements of the Data Protection Act 1998 must be adhered to.

42 In accordance with paragraph 7.18 of the Code of Practice, where a United Kingdom public authority is considering the possible disclosure to overseas authorities of communications data, it must, inter alia, consider whether that data will be adequately protected. However, it is stated in paragraph 7.22 of that code that a transfer of data to a third country may take place where that transfer is necessary for reasons of substantial public interest, even where the third country does not provide an adequate level of protection. On the information given by the referring court in Case C-698/15, the Secretary of State for the Home Department may issue a national security certificate that exempts certain data from the provisions of the legislation.

43 In paragraph 8.1 of that code, it is stated that the 2000 Act established the Interception of Communications Commissioner (United Kingdom), whose remit is, inter alia, to provide

independent oversight of the exercise and performance of the powers and duties contained in Chapter II of Part I of the 2000 Act. As is stated in paragraph 8.3 of the code, the Commissioner may, where he can "establish that an individual has been adversely affected by any wilful or reckless failure", inform that individual of suspected unlawful use of powers.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-203/15

44 On 9 April 2014 Tele2 Sverige, a provider of electronic communications services established in Sweden, informed the PTS that, following the ruling in the judgment of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (Irish Human Rights Commission intervening) (Joined Cases C-293/12 and C-594/12) [2015] QB 127 that Directive 2006/24 was invalid, it would cease, as from 14 April 2014, to retain electronic communications data, covered by the LEK, and that it would erase data retained prior to that date.

45 On 15 April 2014 the Rikspolisstyrelsen (the Swedish National Police Authority) sent to the PTS a complaint to the effect that Tele2 Sverige had ceased to send to it the data concerned.

46 On 29 April 2014 the Justitieminister (Swedish Minister for Justice) appointed a special reporter to examine the Swedish legislation at issue in the light of the *Digital Rights Ireland* case. In a Report dated 13 June 2014, entitled "Datalagring, EU-rätten och svensk rätt, Ds 2014:23" (Data retention, EU law and Swedish law) ("the 2014 Report"), the special reporter concluded that the national legislation on the retention of data, as set out in paragraphs 16a to 16f of the LEK, was not incompatible with either EU law or the European Convention for the Protection of Human Rights and Fundamental Freedoms. The special reporter emphasised that the *Digital Rights Ireland* case could not be interpreted as meaning that the *1353 general and indiscriminate retention of data was to be condemned as a matter of principle. From his perspective, neither should the *Digital Rights Ireland* case be understood as meaning that the court had established, in that judgment, a set of criteria all of which had to be satisfied if legislation was to be able to be regarded as proportionate. He considered that it was necessary to assess all the circumstances in order to determine the compatibility of the Swedish legislation with EU law, such as the extent of data retention in the light of the provisions on access to data, on the duration of retention, and on the protection and the security of data.

47 On that basis, on 19 June 2014 the PTS informed Tele2 Sverige that it was in breach of its obligations under the national legislation in failing to retain the data covered by the LEK for six months, for the purpose of combating crime. By an order of 27 June 2014, the PTS ordered Tele2 Sverige to commence, by no later than 25 July 2014, the retention of that data.

48 Tele2 Sverige considered that the 2014 Report was based on a misinterpretation of the *Digital Rights Ireland* case and that the obligation to retain data was in breach of the fundamental rights guaranteed by the Charter, and therefore brought an action before the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm), Sweden, challenging the

order of 27 June 2014. Since that court dismissed the action, by judgment of 13 October 2014, Tele2 Sverige brought an appeal against that judgment before the referring court.

49 In the opinion of the referring court, the compatibility of the Swedish legislation with EU law should be assessed with regard to article 15(1) of Directive 2002/58 . While that Directive establishes the general rule that traffic and location data should be erased or made anonymous when no longer required for the transmission of a communication, article 15(1) of that Directive introduces a derogation from that general rule since it permits the member states, where justified on one of the specified grounds, to restrict that obligation to erase or render anonymous, or even to make provision for the retention of data. Accordingly, EU law allows, in certain situations, the retention of electronic communications data.

50 The referring court none the less seeks to ascertain whether a general and indiscriminate obligation to retain electronic communications data, such as that at issue in the main proceedings, is compatible, taking into consideration the Digital Rights Ireland case, with article 15(1) of Directive 2002/58 , read in the light of articles 7 and 8 and article 52(1) of the Charter. Given that the opinions of the parties differ on that point, it is necessary that the court give an unequivocal ruling on whether, as maintained by Tele2 Sverige, the general and indiscriminate retention of electronic communications data is per se incompatible with articles 7 and 8 and article 52(1) of the Charter, or whether, as stated in the 2014 Report, the compatibility of such retention of data is to be assessed in the light of provisions relating to access to the data, the protection and security of the data and the duration of retention.

51 In those circumstances the Kamarrätten i Stockholm (Administrative Court of Appeal of Stockholm), Sweden, decided to stay the proceedings and to refer to the court the following questions for a preliminary ruling:

“(1) Is a general obligation to retain traffic data covering all persons, all means of electronic communication and all traffic data without any ***1354** distinctions, limitations or exceptions for the purpose of combating crime ... compatible with article 15(1) of Directive 2002/58/EC , taking account of articles 7 and 8 and article 52(1) of the Charter?

“(2) If the answer to question (1) is in the negative, may the retention nevertheless be permitted where: (a) access by the national authorities to the retained data is determined as [described in paras 19&-36 of the order for reference], and (b) data protection and security requirements are regulated as [described in paras 38-43 of the order for reference], and (c) all relevant data is to be retained for six months, calculated as from the day when the communication is ended, and subsequently erased as [described in para 37 of the order for reference]?”

Case C-698/15

52 Mr Watson, Mr Brice and Mr Lewis each lodged, before the High Court of Justice (England and Wales), Queen's Bench Division (Divisional Court), United Kingdom, applications for judicial review of the legality of section 1 of the 2014 Act, claiming, inter alia, that that

section is incompatible with articles 7 and 8 of the Charter and article 8 of the Human Rights Convention .

53 By judgment of 17 July 2015, the High Court (R (Davis) v Secretary of State for the Home Department (Open Rights Group intervening) [2015] EWHC 2092 (Admin); [2016] 1 CMLR 13) held that the Digital Rights Ireland case laid down “mandatory requirements of EU law” applicable to the legislation of member states on the retention of communications data and access to such data. According to the High Court, since the Court of Justice, in that judgment, held that Directive 2006/24 was incompatible with the principle of proportionality, national legislation containing the same provisions as that Directive could, equally, not be compatible with that principle. It follows from the underlying logic of the Digital Rights Ireland case that legislation that establishes a general body of rules for the retention of communications data is in breach of the rights guaranteed in articles 7 and 8 of the Charter, unless that legislation is complemented by a body of rules for access to the data, defined by national law, which provides sufficient safeguards to protect those rights. Accordingly, section 1 of the 2014 Act is not compatible with articles 7 and 8 of the Charter in so far as it does not lay down clear and precise rules providing for access to and use of retained data and in so far as access to that data is not made dependent on prior review by a court or an independent administrative body.

54 The Secretary of State for the Home Department brought an appeal against that judgment before the Court of Appeal (England and Wales) (Civil Division), United Kingdom.

55 That court ([2015] EWCA Civ 1185; [2017] 1 All ER 62) states that section 1(1) of the 2014 Act empowers the Secretary of State for the Home Department to adopt, without any prior authorisation from a court or an independent administrative body, a general regime requiring public telecommunications operators to retain all data relating to any postal service or any telecommunications service for a maximum period of 12 months if he/she considers that such a requirement is necessary and proportionate to achieve the purposes stated in the United Kingdom legislation. Even though that data does not include the content of a communication, it could be highly intrusive into the privacy of users of communications services.

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56 In the order for reference and in its judgment of 20 November 2015, delivered in the appeal procedure, wherein it decided to send to the court this request for a preliminary ruling, the referring court considers that the national rules on the retention of data necessarily fall within the scope of article 15(1) of Directive 2002/58 and must therefore conform to the requirements of the Charter. However, as stated in article 1(3) of that Directive, the EU legislature did not harmonise the rules relating to access to retained data.

57 As regards the effect of the Digital Rights Ireland case on the issues raised in the main proceedings, the referring court states that, in the case that gave rise to that judgment, the court was considering the validity of Directive 2006/24 and not the validity of any national legislation. Having regard, inter alia, to the close relationship between the retention of data and access to that data, it was essential that that Directive should incorporate a set of

safeguards and that the Digital Rights Ireland case should analyse, when examining the lawfulness of the data retention regime established by that Directive, the rules relating to access to that data. The court had not therefore intended to lay down, in that judgment, mandatory requirements applicable to national legislation on access to data that does not implement EU law. Further, the reasoning of the court was closely linked to the objective pursued by Directive 2006/24. National legislation should, however, be assessed in the light of the objectives pursued by that legislation and its context.

58 As regards the need to refer questions to the court for a preliminary ruling, the referring court draws attention to the fact that, when the order for reference was issued, six courts in other member states, five of those courts being courts of last resort, had declared national legislation to be invalid on the basis of the Digital Rights Ireland case. The answer to the questions referred is therefore not obvious, although the answer is required to give a ruling on the cases brought before that court.

59 In those circumstances, the Court of Appeal decided to stay the proceedings and to refer to the court the following questions for a preliminary ruling:

“(1) Does [the Digital Rights Ireland case] (including, in particular, paras 60–62 thereof) lay down mandatory requirements of EU law applicable to a member state's domestic regime governing access to data retained in accordance with national legislation, in order to comply with articles 7 and 8 of [the Charter]?”

“(2) Does [the Digital Rights Ireland case] expand the scope of articles 7 and/or 8 of [the Charter] beyond that of article 8 of the European Convention of Human Rights ... as established in the jurisprudence of the European Court of Human Rights ... ?”

The procedure before the court

60 By order of 1 February 2016, in *Secretary of State for the Home Department v Watson* (Open Rights Group intervening) (Case C-698/15) EU:C:2016:70, the President of the court decided to grant the request of the Court of Appeal (England and Wales) that Case C-698/15 should be dealt with under the expedited procedure provided for in article 105(1) of the court's Rules of Procedure.

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61 By decision of the President of the court of 10 March 2016, Cases C-203/15 and C-698/15 were joined for the purposes of the oral part of the procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question in Case C-203/15

62 By the first question in Case C-203/15, the Kamarrätten i Stockholm seeks, in essence, to ascertain whether article 15(1) of Directive 2002/58, read in the light of articles 7 and 8 and article 52(1) of the Charter, must be interpreted as precluding national legislation such as that at issue in the main proceedings that provides, for the purpose of fighting crime, for

general and indiscriminate retention of all traffic and location data of all subscribers and registered users with respect to all means of electronic communications.

63 That question arises, in particular, from the fact that Directive 2006/24, which the national legislation at issue in the main proceedings was intended to transpose, was declared to be invalid by the Digital Rights Ireland case, though the parties disagree on the scope of that judgment and its effect on that legislation, given that it governs the retention of traffic and location data and access to that data by the national authorities.

64 It is necessary first to examine whether national legislation such as that at issue in the main proceeding falls within the scope of EU law.

The scope of Directive 2002/58

65 The member states that have submitted written observations to the court have differed in their opinions as to whether and to what extent national legislation on the retention of traffic and location data and access to that data by the national authorities, for the purpose of combating crime, falls within the scope of Directive 2002/58. Whereas, in particular, the Belgian, Danish, German and Estonian Governments, Ireland and the Netherlands Government have expressed the opinion that the answer is that it does, the Czech Government has proposed that the answer is that it does not, since the sole objective of such legislation is to combat crime. The United Kingdom Government, for its part, argues that only legislation relating to the retention of data, but not legislation relating to the access to that data by the competent national law enforcement authorities, falls within the scope of that Directive.

66 As regards, finally, the European Commission, while it maintained, in its written observations submitted to the court in Case C-203/15, that the national legislation at issue in the main proceedings falls within the scope of Directive 2002/58, the European Commission argues, in its written observations in Case C-698/15, that only national rules relating to the retention of data, and not those relating to the access of the national authorities to that data, fall within the scope of that Directive. The latter rules should, however, according to the European Commission, be taken into consideration in order to assess whether national legislation governing the retention of data by providers of electronic communications services constitutes a proportionate interference in the fundamental rights guaranteed in articles 7 and 8 of the Charter.

67 In that regard, it must be observed that a determination of the scope of Directive 2002/58 must take into consideration, inter alia, the general structure of that Directive.

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68 Article 1(1) of Directive 2002/58 indicates that the Directive provides, inter alia, for the harmonisation of the provisions of national law required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communications sector.

69 Article 1(3) of that Directive excludes from its scope "activities of the state" in specified fields, including the activities of the state in areas of criminal law and in the areas of public security, defence and state security, including the economic well-being of the state when the activities relate to state security matters: see, by analogy, with respect to the first indent of article 3(2) of Directive 95/46, *Criminal proceedings against Lindqvist* (Case C-101/01) [2004] QB 1014; [2003] ECR I-12971, para 43 and *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy* (Case C-73/07) [2008] ECR I-9831; [2010] All ER (EC) 213, para 41.

70 Article 3 of Directive 2002/58 states that the Directive is to apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the European Union, including public communications networks supporting data collection and identification devices ("electronic communications services"). Consequently, that Directive must be regarded as regulating the activities of the providers of such services.

71 Article 15(1) of Directive 2002/58 states that member states may adopt, subject to the conditions laid down, "legislative measures to restrict the scope of the rights and obligations provided for in article 5, article 6, article 8(1), (2), (3) and (4), and article 9 [of that Directive]". The second sentence of article 15(1) of that Directive identifies, as an example of measures that may thus be adopted by member states, measures "providing for the retention of data".

72 Admittedly, the legislative measures that are referred to in article 15(1) of Directive 2002/58 concern activities characteristic of states or state authorities, and are unrelated to fields in which individuals are active: see *Productores de Música de España (Promusicae) v Telefónica de España SAU* (Case C-275/06) [2008] ECR I-271; [2008] All ER (EC) 809, para 51. Moreover, the objectives which, under that provision, such measures must pursue, such as safeguarding national security, defence and public security and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications system, overlap substantially with the objectives pursued by the activities referred to in article 1(3) of that Directive.

73 However, having regard to the general structure of Directive 2002/58, the factors identified in the preceding paragraph of this judgment do not permit the conclusion that the legislative measures referred to in article 15(1) of Directive 2002/58 are excluded from the scope of that Directive, for otherwise that provision would be deprived of any purpose. Indeed, article 15(1) necessarily presupposes that the national measures referred to therein, such as those relating to the retention of data for the purpose of combating crime, fall within the scope of that Directive, since it expressly authorises the member states to adopt them only if the conditions laid down in the Directive are met.

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74 Further, the legislative measures referred to in article 15(1) of Directive 2002/58 govern, for the purposes mentioned in that provision, the activity of providers of electronic communications services. Accordingly, article 15(1), read together with article 3 of that

Directive, must be interpreted as meaning that such legislative measures fall within the scope of that Directive.

75 The scope of that Directive extends, in particular, to a legislative measure, such as that at issue in the main proceedings, that requires such providers to retain traffic and location data, since to do so necessarily involves the processing, by those providers, of personal data.

76 The scope of that Directive also extends to a legislative measure relating, as in the main proceedings, to the access of the national authorities to the data retained by the providers of electronic communications services.

77 The protection of the confidentiality of electronic communications and related traffic data, guaranteed in article 5(1) of Directive 2002/58, applies to the measures taken by all persons other than users, whether private persons or bodies or state bodies. As confirmed in recital (21) of that Directive, the aim of the Directive is to prevent unauthorised access to communications, including “any data related to such communications”, in order to protect the confidentiality of electronic communications.

78 In those circumstances, a legislative measure whereby a member state, on the basis of article 15(1) of Directive 2002/58, requires providers of electronic communications services, for the purposes set out in that provision, to grant national authorities, on the conditions laid down in such a measure, access to the data retained by those providers, concerns the processing of personal data by those providers, and that processing falls within the scope of that Directive.

79 Further, since data is retained only for the purpose, when necessary, of making that data accessible to the competent national authorities, national legislation that imposes the retention of data necessarily entails, in principle, the existence of provisions relating to access by the competent national authorities to the data retained by the providers of electronic communications services.

80 That interpretation is confirmed by article 15(1b) of Directive 2002/58, which provides that providers are to establish internal procedures for responding to requests for access to users' personal data, based on provisions of national law adopted pursuant to article 15(1) of that Directive.

81 It follows from the foregoing that national legislation, such as that at issue in the main proceedings in Cases C-203/15 and C-698/15, falls within the scope of Directive 2002/58.

The interpretation of article 15(1) of Directive 2002/58, in the light of articles 7, 8, 11 and article 52(1) of the Charter

82 It must be observed that, according to article 1(2) of Directive 2002/58, the provisions of that Directive “particularise and complement” Directive 95/46. As stated in its recital (2), Directive 2002/58 seeks to ensure, in particular, full respect for the rights set out in articles 7 and 8 of the Charter. In that regard, it is clear from the explanatory memorandum of the Proposal for a Parliament and Council Directive concerning the processing of personal data and the protection of privacy in the electronic *1359 communications sector (COM(2000) 385 final), which led to Directive 2002/58, that the EU legislature sought “to ensure that a

high level of protection of personal data and privacy will continue to be guaranteed for all electronic communications services regardless of the technology used”.

83 To that end, Directive 2002/58 contains specific provisions designed, as is apparent from, in particular, recitals (6) and (7) of that Directive, to offer to the users of electronic communications services protection against risks to their personal data and privacy that arise from new technology and the increasing capacity for automated storage and processing of data.

84 In particular, article 5(1) of that Directive provides that the member states must ensure, by means of their national legislation, the confidentiality of communications effected by means of a public communications network and publicly available electronic communications services, and the confidentiality of the related traffic data.

85 The principle of confidentiality of communications established by Directive 2002/58 implies, *inter alia*, as stated in the second sentence of article 5(1) of that Directive, that, as a general rule, any person other than the users is prohibited from storing, without the consent of the users concerned, the traffic data related to electronic communications. The only exceptions relate to persons lawfully authorised in accordance with article 15(1) of that Directive and to the technical storage necessary for conveyance of a communication: see the *Promusicae* case [2008] ECR I-271 , para 47.

86 Accordingly, as confirmed by recitals (22) and (26) of Directive 2002/58 , under article 6 of that Directive, the processing and storage of traffic data are permitted only to the extent necessary and for the time necessary for the billing and marketing of services and the provision of value added services: see the *Promusicae* case, paras 47 and 48. As regards, in particular, the billing of services, that processing is permitted only up to the end of the period during which the bill may be lawfully challenged or legal proceedings brought to obtain payment. Once that period has elapsed, the data processed and stored must be erased or made anonymous. As regards location data other than traffic data, article 9(1) of that Directive provides that that data may be processed only subject to certain conditions and after it has been made anonymous or the consent of the users or subscribers obtained.

87 The scope of article 5, article 6 and article 9(1) of Directive 2002/58 , which seek to ensure the confidentiality of communications and related data, and to minimise the risks of misuse, must moreover be assessed in the light of recital (30) of that Directive, which states: “Systems for the provision of electronic communications networks and services should be designed to limit the amount of personal data necessary to a strict minimum”.

88 Admittedly, article 15(1) of Directive 2002/58 enables the member states to introduce exceptions to the obligation of principle, laid down in article 5(1) of that Directive, to ensure the confidentiality of personal data, and to the corresponding obligations, referred to in articles 6 and 9 of that Directive: see the *Promusicae* case [2008] ECR I-271 , para 50.

89 None the less, in so far as article 15(1) of Directive 2002/58 enables member states to restrict the scope of the obligation of principle to ensure the confidentiality of communications and related traffic data, that provision must, in accordance with the court's settled case law, be interpreted strictly: ***1360** see, by analogy, *Probst v mr nexnet GmbH*

(Case C-119/12) [2013] CEC 913 , para 23. That provision cannot, therefore, permit the exception to that obligation of principle and, in particular, to the prohibition on storage of data, laid down in article 5 of Directive 2002/58 , to become the rule, if the latter provision is not to be rendered largely meaningless.

90 It must, in that regard, be observed that the first sentence of article 15(1) of Directive 2002/58 provides that the objectives pursued by the legislative measures that it covers, which derogate from the principle of confidentiality of communications and related traffic data, must be "to safeguard national security—that is, state security—defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system", or one of the other objectives specified in article 13(1) of Directive 95/46 , to which the first sentence of article 15(1) of Directive 2002/58 refers: see the *Promusicae* case, para 53. That list of objectives is exhaustive, as is apparent from the second sentence of article 15(1) of Directive 2002/58 , which states that the legislative measures must be justified on "the grounds laid down" in the first sentence of article 15(1) of that Directive. Accordingly, the member states cannot adopt such measures for purposes other than those listed in that latter provision.

91 Further, the third sentence of article 15(1) of Directive 2002/58 provides that "all the measures referred to [in article 15(1)] shall be in accordance with the general principles of [European Union] law, including those referred to in article 6(1) and (2) [EU]", which include the general principles and fundamental rights now guaranteed by the Charter. Article 15(1) of Directive 2002/58 must, therefore, be interpreted in the light of the fundamental rights guaranteed by the Charter: see, by analogy, in relation to Directive 95/46 , *Rechnungshof v Österreichischer Rundfunk* (Joined Cases C-465/00, C-138/01 and C-139/01) [2003] ECR I-4989 , para 68; *Google Spain SL v Agencia Española de Protección de Datos (AEPD)* (Case C-131/12) [2014] QB 1022 , para 68 and *Schrems v Data Protection Comr* (Case C-362/14) [2016] QB 527 , para 38.

92 In that regard, it must be emphasised that the obligation imposed on providers of electronic communications services, by national legislation such as that at issue in the main proceedings, to retain traffic data in order, when necessary, to make that data available to the competent national authorities, raises questions relating to compatibility not only with articles 7 and 8 of the Charter, which are expressly referred to in the questions referred for a preliminary ruling, but also with the freedom of expression guaranteed in article 11 of the Charter: see, by analogy, in relation to Directive 2006/24 , the *Digital Rights Ireland* case [2015] QB 127 , paras 25 and 70.

93 Accordingly, the importance both of the right to privacy, guaranteed in article 7 of the Charter, and of the right to protection of personal data, guaranteed in article 8 of the Charter, as derived from the court's case law (see *Schrems*' case [2016] QB 527 , para 39 and the case law cited), must be taken into consideration in interpreting article 15(1) of Directive 2002/58 . The same is true of the right to freedom of expression in the light of the particular importance accorded to that freedom in any democratic society. That fundamental right, guaranteed in article 11 of the Charter, constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under article 2 TEU of the EU Treaty , the Union is ***1361** founded: see *Eugen Schmidberger Internationale Transporte*

und Planzüge v Republic of Austria (Case C-112/00) [2003] ECR I-5659 , para 79& and Criminal proceedings against Patriciello (Case C-163/10) [2011] ECR I-7565 , para 31.

94 In that regard, it must be recalled that, under article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. With due regard to the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and if they genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others: *N v Staatssecretaris voor Veiligheid en Justitie* (Case C-601/15PPU) [2016] 1 WLR 3027 , para 50.

95 With respect to that last issue, the first sentence of article 15(1) of Directive 2002/58 provides that member states may adopt a measure that derogates from the principle of confidentiality of communications and related traffic data where it is a "necessary, appropriate and proportionate measure within a democratic society", in view of the objectives laid down in that provision. As regards recital (11) of that Directive, it states that a measure of that kind must be "strictly" proportionate to the intended purpose. In relation to, in particular, the retention of data, the requirement laid down in the second sentence of article 15(1) of that Directive is that data should be retained "for a limited period" and be "justified" by reference to one of the objectives stated in the first sentence of article 15(1) of that Directive.

96 Due regard to the principle of proportionality also derives from the court's settled case law to the effect that the protection of the fundamental right to respect for private life at EU level requires that derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary: the *Tietosuoja* case [2008] ECR I-9831 , para 56; *Volker und Markus Schecke GbR v Land Hessen* (Bundesanstalt für Landwirtschaft und Ernährung, joint party) (Joined Cases C-92/09 and C-93/09) [2010] ECR I-11063; [2012] All ER (EC) 127 , para 77; the *Digital Rights Ireland* case, para 52 and *Schrems* case, para 92.

97 As regards whether national legislation, such as that at issue in Case C-203/15, satisfies those conditions, it must be observed that that legislation provides for a general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication, and that it imposes on providers of electronic communications services an obligation to retain that data systematically and continuously, with no exceptions. As stated in the order for reference, the categories of data covered by that legislation correspond, in essence, to the data whose retention was required by Directive 2006/24 .

98 The data which providers of electronic communications services must therefore retain makes it possible to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to establish the location of mobile communication equipment. That data includes, inter alia, the name and address of the subscriber or registered user, the telephone number of the caller, the number called and an IP address for internet services.

That data makes it possible, in particular, to identify the *1362 person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. Further, that data makes it possible to know how often the subscriber or registered user communicated with certain persons in a given period: see, by analogy, with respect to Directive 2006/24 , the Digital Rights Ireland case, para 26.

99 That data, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them: see, by analogy, in relation to Directive 2006/24 , the Digital Rights Ireland case [2015] QB 127 , para 27. In particular, that data provides the means, as observed by Advocate General Saugmandsgaard Øe in points 253, 254 and 257–259 of his opinion, of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications.

100 The interference entailed by such legislation in the fundamental rights enshrined in articles 7 and 8 of the Charter is very far reaching and must be considered to be particularly serious. The fact that the data is retained without the subscriber or registered user being informed is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance: see, by analogy, in relation to Directive 2006/24 , the Digital Rights Ireland case, para 37.

101 Even if such legislation does not permit retention of the content of a communication and is not, therefore, such as to affect adversely the essence of those rights (see, by analogy, in relation to Directive 2006/24 , the Digital Rights Ireland case, para 39), the retention of traffic and location data could none the less have an effect on the use of means of electronic communication and, consequently, on the exercise by the users thereof of their freedom of expression, guaranteed in article 11 of the Charter: see, by analogy, in relation to Directive 2006/24 , the Digital Rights Ireland case, para 28.

102 Given the seriousness of the interference in the fundamental rights concerned represented by national legislation which, for the purpose of fighting crime, provides for the retention of traffic and location data, only the objective of fighting serious crime is capable of justifying such a measure: see, by analogy, in relation to Directive 2006/24 , the Digital Rights Ireland case [2015] QB 127 , para 60.

103 Further, while the effectiveness of the fight against serious crime, in particular organised crime and terrorism, may depend to a great extent on the use of modern investigation techniques, such an objective of general interest, however fundamental it may be, cannot in itself justify that national legislation providing for the general and indiscriminate retention of all traffic and location data should be considered to be necessary for the purposes of that fight: see, by analogy, in relation to Directive 2006/24 , the Digital Rights Ireland case, para 51.

104 In that regard, it must be observed, first, that the effect of such legislation, in the light of its characteristic features as described in para 97 above, is that the retention of traffic and location data is the rule, whereas the system put in place by Directive 2002/58 requires the retention of data to be the exception.

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105 Second, national legislation such as that at issue in the main proceedings, which covers, in a generalised manner, all subscribers and registered users and all means of electronic communication as well as all traffic data, provides for no differentiation, limitation or exception according to the objective pursued. It is comprehensive in that it affects all persons using electronic communication services, even though those persons are not, even indirectly, in a situation that is liable to give rise to criminal proceedings. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious criminal offences. Further, it does not provide for any exception, and consequently it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy: see, by analogy, in relation to Directive 2006/24, the Digital Rights Ireland case [2015] QB 127, paras 57 and 58.

106 Such legislation does not require there to be any relationship between the data which must be retained and a threat to public security. In particular, it is not restricted to retention in relation to (i) data pertaining to a particular time period and/or geographical area and/or a group of persons likely to be involved, in one way or another, in a serious crime, or (ii) persons who could, for other reasons, contribute, through their data being retained, to fighting crime: see, by analogy, in relation to Directive 2006/24, the Digital Rights Ireland case, para 59.

107 National legislation such as that at issue in the main proceedings therefore exceeds the limits of what is strictly necessary and cannot be considered to be justified, within a democratic society, as required by article 15(1) of Directive 2002/58, read in the light of articles 7, 8 and 11 and article 52(1) of the Charter.

108 However, article 15(1) of Directive 2002/58, read in the light of articles 7, 8 and 11 and article 52(1) of the Charter, does not prevent a member state from adopting legislation permitting, as a preventive measure, the targeted retention of traffic and location data, for the purpose of fighting serious crime, provided that the retention of data is limited, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, to what is strictly necessary.

109 In order to satisfy the requirements set out in the preceding paragraph, that national legislation must, first, lay down clear and precise rules governing the scope and application of such a data retention measure and imposing minimum safeguards, so that the persons whose data has been retained have sufficient guarantees of the effective protection of their personal data against the risk of misuse. That legislation must, in particular, indicate in what circumstances and under which conditions a data retention measure may, as a preventive measure, be adopted, thereby ensuring that such a measure is limited to what is strictly

necessary: see, by analogy, in relation to Directive 2006/24, the Digital Rights Ireland case, para 54 and the case law cited.

110 Second, as regards the substantive conditions which must be satisfied by national legislation that authorises, in the context of fighting crime, the retention, as a preventive measure, of traffic and location data, if it is to be ensured that data retention is limited to what is strictly necessary, it must be observed that, while those conditions may vary according to the ***1364** nature of the measures taken for the purposes of prevention, investigation, detection and prosecution of serious crime, the retention of data must continue none the less to meet objective criteria, that establish a connection between the data to be retained and the objective pursued. In particular, such conditions must be shown to be such as actually to circumscribe, in practice, the extent of that measure and, thus, the public affected.

111 As regard the setting of limits on such a measure with respect to the public and the situations that may potentially be affected, the national legislation must be based on objective evidence which makes it possible to identify a public whose data is likely to reveal a link, at least an indirect one, with serious criminal offences, and to contribute in one way or another to fighting serious crime or to preventing a serious risk to public security. Such limits may be set by using a geographical criterion where the competent national authorities consider, on the basis of objective evidence, that there exists, in one or more geographical areas, a high risk of preparation for or commission of such offences.

112 Having regard to all of the foregoing, the answer to the first question referred in Case C-203/15 is that article 15(1) of Directive 2002/58, read in the light of articles 7, 8 and 11 and article 52(1) of the Charter, must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for the general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.

The second question in Case C-203/15 and the first question in Case C-698/15

113 It must, at the outset, be noted that the Kamarrätten i Stockholm referred the second question in Case C-203/15 only in the event that the answer to the first question in that case was negative. That second question, however, arises irrespective of whether retention of data is generalised or targeted, as set out in paras 108–111 above. Accordingly, the court must answer the second question in Case C-203/15 together with the first question in Case C-698/15, which is referred regardless of the extent of the obligation to retain data that is imposed on providers of electronic communications services.

114 By the second question in Case C-203/15 and the first question in Case C-698/15, the referring courts seek, in essence, to ascertain whether article 15(1) of Directive 2002/58, read in the light of articles 7, 8 and article 52(1) of the Charter, must be interpreted as precluding national legislation governing the protection and security of traffic and location data, and more particularly, the access of the competent national authorities to retained data, where that legislation does not restrict that access solely to the objective of fighting serious crime, where that access is not subject to prior review by a court or an independent

administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.

115 As regards objectives that are capable of justifying national legislation that derogates from the principle of confidentiality of electronic communications, it must be borne in mind that, since, as stated in paras 90 and 102 above, the list of objectives set out in the first sentence of article 15(1) of Directive 2002/58 is exhaustive, access to the retained data ***1365** must correspond, genuinely and strictly, to one of those objectives. Further, since the objective pursued by that legislation must be proportionate to the seriousness of the interference in fundamental rights that that access entails, it follows that, in the area of prevention, investigation, detection and prosecution of criminal offences, only the objective of fighting 'serious crime is capable of justifying such access to the retained data.

116 As regards compatibility with the principle of proportionality, national legislation governing the conditions under which the providers of electronic communications services must grant the competent national authorities access to the retained data must ensure, in accordance with what was stated in paras 95 and 96 of this judgment, that such access does not exceed the limits of what is strictly necessary.

117 Further, since the legislative measures referred to in article 15(1) of Directive 2002/58 must, in accordance with recital (11) of that Directive, "be subject to adequate safeguards", a data retention measure must, as follows from the case law cited in para 109 above, lay down clear and precise rules indicating in what circumstances and under which conditions the providers of electronic communications services must grant the competent national authorities access to the data. Likewise, a measure of that kind must be legally binding under domestic law.

118 In order to ensure that access of the competent national authorities to retained data is limited to what is strictly necessary, it is, indeed, for national law to determine the conditions under which the providers of electronic communications services must grant such access. However, the national legislation concerned cannot be limited to requiring that access should be for one of the objectives referred to in article 15(1) of Directive 2002/58, even if that objective is to fight serious crime. That national legislation must also lay down the substantive and procedural conditions governing the access of the competent national authorities to the retained data: see, by analogy, in relation to Directive 2006/24, the Digital Rights Ireland case [2015] QB 127, para 61.

119 Accordingly, and since general access to all retained data, regardless of whether there is any link, at least indirect, with the intended purpose, cannot be regarded as limited to what is strictly necessary, the national legislation concerned must be based on objective criteria in order to define the circumstances and conditions under which the competent national authorities are to be granted access to the data of subscribers or registered users. In that regard, access can, as a general rule, be granted, in relation to the objective of fighting crime, only to the data of individuals suspected of planning, committing or having committed a serious crime or of being implicated in one way or another in such a crime: see, by analogy, *Zakharov v Russia* (2015) 39 BHRC 435, para 260. However, in particular situations, where for example vital national security, defence or public security interests are

threatened by terrorist activities, access to the data of other persons might also be granted where there is objective evidence from which it can be deduced that that data might, in a specific case, make an effective contribution to combating such activities.

120 In order to ensure, in practice, that those conditions are fully respected, it is essential that access of the competent national authorities to retained data should, as a general rule, except in cases of validly established urgency, be subject to a prior review carried out either by a court or by an *1366 independent administrative body, and that the decision of that court or body should be made following a reasoned request by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime: see, by analogy, in relation to Directive 2006/24 , the Digital Rights Ireland case, para 62; see also, by analogy, in relation to article 8 of the Human Rights Convention , Szabó v Hungary (2016) 63 EHRR 3 , paras 77 and 80.

121 Likewise, the competent national authorities to whom access to the retained data has been granted must notify the persons affected, under the applicable national procedures, as soon as that notification is no longer liable to jeopardise the investigations being undertaken by those authorities. That notification is, in fact, necessary to enable the persons affected to exercise, inter alia, their right to a legal remedy, expressly provided for in article 15(2) of Directive 2002/58 , read together with article 22 of Directive 95/46 , where their rights have been infringed: see, by analogy, College van burgemeester en wethouders van Rotterdam v Rijkeboer (Case C-553/07) [2009] ECR I-3889 , para 52 and Schrems' case [2016] QB 527 , para 95.

122 With respect to the rules relating to the security and protection of data retained by providers of electronic communications services, it must be noted that article 15(1) of Directive 2002/58 does not allow member states to derogate from article 4(1) and article 4 (1a) of that Directive. Those provisions require those providers to take appropriate technical and organisational measures to ensure the effective protection of retained data against risks of misuse and against any unlawful access to that data. Given the quantity of retained data, the sensitivity of that data and the risk of unlawful access to it, the providers of electronic communications services must, in order to ensure the full integrity and confidentiality of that data, guarantee a particularly high level of protection and security by means of appropriate technical and organisational measures. In particular, the national legislation must make provision for the data to be retained within the European Union and for the irreversible destruction of the data at the end of the data retention period: see, by analogy, in relation to Directive 2006/24 , the Digital Rights Ireland case [2015] QB 127 , paras 66-68.

123 In any event, the member states must ensure review, by an independent authority, of compliance with the level of protection guaranteed by EU law with respect to the protection of individuals in relation to the processing of personal data, that control being expressly required by article 8(3) of the Charter and constituting, in accordance with the court's settled case law, an essential element of respect for the protection of individuals in relation to the processing of personal data. If that were not so, persons whose personal data was retained would be deprived of the right, guaranteed in article 8(1) and (3) of the Charter, to lodge with the national supervisory authorities a claim seeking the protection of their data: see the Digital Rights Ireland case, para 68 and Schrems' case, paras 41 and 58.

124 It is the task of the referring courts to determine whether and to what extent the national legislation at issue in the main proceedings satisfies the requirements stemming from article 15(1) of Directive 2002/58, read in the light of articles 7, 8 and 11 and article 52(1) of the Charter, as set out in paras 115 to 123 of this judgment, with respect to both the access of the competent national authorities to the retained data and the protection and level of security of that data.

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125 Having regard to all of the foregoing, the answer to the second question in Case C-203/15 and to the first question in Case C-698/15 is that article 15(1) of Directive 2002/58, read in the light of articles 7, 8 and 11 and article 52(1) of the Charter, must be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.

The second question in Case C-698/15

126 By the second question in Case C-698/15 the Court of Appeal seeks in essence to ascertain whether, in the Digital Rights Ireland case, the court interpreted articles 7 and/or 8 of the Charter in such a way as to expand the scope conferred on article 8 Human Rights Convention by the European Court of Human Rights.

127 As a preliminary point, it should be recalled that, whilst, as article 6(3) TEU of the EU Treaty confirms, fundamental rights recognised by the Human Rights Convention constitute general principles of EU law, the Human Rights Convention does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law: see *N v Staatssecretaris voor Veiligheid en Justitie* [2016] 1 WLR 3027, para 45 and the case law cited.

128 Accordingly, the interpretation of Directive 2002/58, which is at issue in this case, must be undertaken solely in the light of the fundamental rights guaranteed by the Charter: see *N v Staatssecretaris voor Veiligheid en Justitie*, para 46 and the case law cited.

129 Further, it must be borne in mind that the explanation on article 52 of the Charter indicates that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the Human Rights Convention, "without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union": *N v Staatssecretaris voor Veiligheid en Justitie*, para 47. In particular, as expressly stated in the second sentence of article 52(3) of the Charter, the first sentence of article 52(3) does not preclude Union law from providing protection that is more extensive than the Human Rights Convention. It should be added, finally, that article 8 of the Charter concerns a fundamental right which is distinct from that enshrined in article 7 of the Charter and which has no equivalent in the Human Rights Convention.

130 However, in accordance with the court's settled case law, the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law: see *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano* (Case C-571/10) [2013] All ER (EC) 125 , para 41; *Åklagaren v Åkerberg Fransson* (Case C-617/10) [2013] STC 1905 , para 42 and *Pohotovost'sro v Vašuta* (*Združenie na ochranu občana spotrebite'a HOOS intervening*) (Case C-470/12) [2014] 1 All ER (Comm) 1016 , para 29.

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131 In this case, in view of the considerations set out, in particular, in paras 128 and 129 above, the question whether the protection conferred by articles 7 and 8 of the Charter is wider than that guaranteed in article 8 of the Human Rights Convention is not such as to affect the interpretation of Directive 2002/58 , read in the light of the Charter, which is the matter in dispute in the proceedings in Case C-698/15.

132 Accordingly, it does not appear that an answer to the second question in Case C-698/15 can provide any interpretation of points of EU law that is required for the resolution, in the light of that law, of that dispute.

133 It follows that the second question in Case C-698/15 is inadmissible.

Costs

134 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1 Article 15(1) of Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Directive on privacy and electronic communications), as amended by Parliament and Council Directive 2009/136/EC of 25 November 2009 , read in the light of articles 7, 8 and 11 and article 52(1) of the Charter of Fundamental Rights of the European Union , must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.

2 Article 15(1) of Directive 2002/58 , as amended by Directive 2009/136 , read in the light of articles 7, 8 and 11 and article 52(1) of the Charter of Fundamental Rights , must be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data,

where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.

3 The second question referred by the Court of Appeal (England and Wales) (Civil Division) is inadmissible.

Susanne Rook, Barrister

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1. Charter of Fundamental Rights of the European Union, art 7 : "Everyone has the right to respect for his or her private and family life, home and communications." Art 8(1) : "Everyone has the right to the protection of personal data concerning him or her." Art 11(1) : "Everyone has the right to freedom of expression." Art 52(1) : see post, judgment, para 94.
 2. Data Retention and Investigatory Powers Act 2014, s 1 : see post, judgment, para 29.
 3. Parliament and Council Directive 2002/58/EC , as amended, art 15(1) : see post, judgment, para 11.
 4. Madison, "Federalist No 51", in *Genovese , The Federalist Papers ,* (2009), p 120. Madison was one of the principal authors and one of the 39 signatories of the United States Constitution (1787). He went on to become the fourth President of the United States (from 1809 to 1817).
 5. *Reporter's note* . The superior figures in the text refer to notes which can be found at the end of the opinion, on pp 1334-1340.
 6. This ability to "examine the past" may be especially helpful in identifying potential accomplices: see points 178-184 above.
 7. It is understandable that this should be so, given that the national regimes were intended to transpose the Directive, which has now been declared invalid.
 8. See the description of the national regimes at issue in the main proceedings given in points 11-13 and 36 above.
 9. In accordance with the third sub-paragraph of article 6(1)EU and article 52(7) of the Charter, regard must be had to the explanations relating to the Charter when interpreting the Charter: see *Åklagaren v Åkerberg Fransson* (Case C-617/10) [2013] STC 1905 , para 20 and *N v Staatssecretaris voor Veiligheid en Justitie* (Case C-601/15PPU) [2016] 1 WLR 3027 , para 47. According to those explanations, article 7 of the Charter corresponds to article 8 of the Human Rights Convention , while article 8 of the Charter does not correspond to any right in the Human Rights Convention .
 10. Since Directive 2002/58 may be regarded as a *lex specialis vis-à-vis* Directive 95/46 (see article 1(2) of Directive 2002/58), I do not think it necessary to verify the compatibility of general data retention obligations with the regime established by Directive 95/46 ; which, moreover, is not mentioned in the questions that have been referred to the court. For the sake of completeness, I would nevertheless add that the wording of article 13(1) of Directive 95/46 allows the member states greater latitude than that of article 15(1) of Directive 2002/58 , the scope of which is limited to the sphere of the provision of publicly available electronic communications services. Since the possibility provided for in article 15(1) of Directive 2002/58 enables the member states to impose general data retention obligations, I infer that article 13(1) of Directive 95/46 does also.
 11. The court's settled case law indeed states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. Accordingly, the court has already pointed out that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law. On the other hand, if such legislation falls within the scope of EU law, the court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in

order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the court ensures: see Åklagaren's case, para 19 and the case law cited.

12. To be more precise, the second sentence of article 51(1) of the Charter provides that the member states must observe the rights guaranteed by the Charter when they are implementing EU law.

13. See, in particular, United Nations Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression of 17 April 2013, A/HRC/23/40, para 33: "Technological advancements mean that the state's effectiveness in conducting surveillance is no longer limited by scale or duration ... As such, the state now has a greater capacity to conduct simultaneous, invasive, targeted and broad-scale surveillance than ever before." See also para 50: "Generally, legislation has not kept pace with the changes in technology. In most states, legal standards are either non-existent or inadequate to deal with the modern communications surveillance environment."

14. I shall nevertheless come back to the specific risks posed by the creation of such vast databases when I address the requirement of proportionality, within a democratic society, pertaining to general data retention obligations such as those at issue in the main proceedings: see points 252–261 above.

15. I find confirmation of the cumulative nature of the requirements in the last sentence of article 15(1) of Directive 2002/58, which provides that "all the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in article 6(1) and (2) [EU]". Pursuant to article 6(1) TEU: "The Union recognises the rights, freedoms and principles set out in the [Charter], which shall have the same legal value as the Treaties".

16. As a logical consequence of their cumulative nature, where the requirements of those two provisions overlap, the stricter of the two must be applied, that is to say, the requirement that affords greater protection of the right in question.

17. See, *inter alia*, Schwarz v Stadt Bochum (Case C-291/12) [2014] 2 CMLR 5, para 35 (interference provided for by an EU Regulation); Criminal proceedings against Spasic (Case C-129/14PPU) [2015] 2 CMLR 1, para 57 (interference provided for by the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, which was signed on 19 June 1990 and came into force on 26 March 1995); Delvigne v Commune de Lesparre-Médoc (Case C-650/13) [2016] 1 WLR 1223, para 47 (interference provided for by the French Electoral Code and the French Criminal Code); and Neptune Distribution SNC v Ministre de l'économie et des Finances (Case C-157/14) [2016] 2 CMLR 24, para 69 (interference provided for by an EU Regulation and an EU Directive).

18. More precisely, the court cannot, in my view, adopt an interpretation of the requirement for a legal basis that is more permissive than that of the Court of Human Rights, one that would allow more instances of interference than would result from the Court of Human Rights's interpretation of that requirement.

19. The concept of "provided for by law" is used in article 8.2 of the Human Rights Convention (right to respect for private and family life) ("in accordance with the law"), article 9.2 (freedom of thought, conscience and religion) ("prescribed by law"), article 10.2 (freedom of expression) and article 11.2 (freedom of assembly and association) ("prescribed by law"). In the Charter, article 52(1) applies to any limitation on the exercise of the rights enshrined in the Charter, where such limitations are in fact permitted.

20. See Peers, "Article 52 —Scope of guaranteed rights" in Peers, *The EU Charter of Fundamental Rights: A Commentary*, (2014), para [52.39].

21. See, in particular, Sanoma Uitgevers BV v The Netherlands 30 BHRC 318, para 83: "the [word 'law'] which [appears] in articles 8 to 11 of the [Human Rights Convention includes] both 'written law', encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. 'Law' must be understood to include both statutory law and judge-made 'law'."

22. That requirement does not emerge from the wording of article 15(1) of Directive 2002/58 or from the general structure of Directive 2002/58, for the reasons which I set out in points 99–116 of this opinion.

23. The European Commission too has emphasised that the additional value of general data retention obligations over and above that of targeted data preservation lies in this limited ability to examine the past: see the European Commission's Staff Working Document annexed to the Proposal for a Directive which led to the adoption of Directive 2006/24, SEC(2005) 1131, 21 September 2005, section 3.6, "Data Preservation versus Data Retention": "with only data preservation as a tool, it is impossible for investigators to go back in time. Data preservation is only useful as of the moment when suspects have been identified—data retention is indispensable in many cases to actually identify those suspects."

24. The French Government has referred in this connection to the report of its Conseil d'état entitled *Le numérique et les droits fondamentaux*, (2014), pp 209 and 210. The Conseil d'état states that a system of targeted surveillance measures "would be significantly less effective than systematic data retention from the point of view of national security and identifying criminals. Such a system affords no retrospective access to exchanges that took place before the authorities identified a threat or discovered a crime: its operational character would thus depend on the authorities' ability to anticipate whose connection data might be useful, something which it would be impossible for the judicial police to do. In the case of a crime, for example, a court would have no access to communications effected prior to the crime, even though that information could be valuable or even indispensable in identifying the offender and his accomplices, as has been shown by certain recent cases involving terrorist attacks. In the sphere of the prevention of acts endangering national security, new technical programmes rely on an ability to detect weak signals, something which is incompatible with the concept of the advance targeting of dangerous persons."

25. The European Commission's Staff Working Document annexed to the Proposal for a Directive which led to the adoption of Directive 2006/24, SEC(2005) 1131, 21 September 2005, section 1.2: "The importance of traffic data for law enforcement."

26. In legal theory, see, in particular, *Pirker, Proportionality Analysis and Models of Judicial Review*, (2013), p 29: "Under a necessity test, the adjudicator examines whether there exists an alternative measure which achieves the same degree of satisfaction for the first value while entailing a lower degree of non-satisfaction of the second value."

27. See Rivers, "Proportionality and variable intensity of review" (2006) 65 CLJ 174, 198: "The test of necessity thus expresses the idea of efficiency or Pareto-optimality. A distribution is efficient or Pareto-optimal if no other distribution could make at least one person better off without making any one else worse off. Likewise, an act is necessary if no alternative act could make the victim better off in terms of rights-enjoyment without reducing the level of realisation of some other constitutional interest."

28. On the two elements of the test of necessity, see *Barak, Proportionality: Constitutional Rights and their Limitations* (2012), pp 323–331.

29. "It must therefore be held that Directive 2006/24 entails a wide ranging and particularly serious interference with those fundamental rights in the legal order of the EU, *without* such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary" (my italics).

30. See the "Issue Paper on the Rule of Law on the Internet and in the Wider Digital World", published by the Council of Europe Commissioner for Human Rights, December 2014, CommDH/IssuePaper (2014)1, p 115, the Report of the United Nations High Commissioner for Human Rights (Human Rights Council) on The Right to Privacy in the Digital Age of 30 June 2014, A/HRC/27/37, para 26, and the Report of the Special Rapporteur (United Nations, General Assembly) on The Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism of 23 September 2014, A/69/397, paras 18, 19.

31. That observation relates solely to general data retention obligations (which are liable to cover all persons whether or not they have any connection with a serious crime), not to targeted surveillance measures (which are focused on persons who have already been identified as being connected with a serious crime): on this distinction, see points 178–183 above.

32. The German Government in particular stated at the hearing that the German Parliament had excluded e-mails from the retention obligation imposed under German law, but that its regime covered all users and all of the national territory.

33. See *Barak, Proportionality: Constitutional Rights and their Limitations*, (2012), p 344: "The first three components of proportionality deal mainly with the relation between the limiting law's purpose and the means to fulfil that purpose ... Accordingly, those tests are referred to as means-end analysis. *They are not based on balancing*. The test of proportionality *stricto sensu* is different ... It focuses on the relation between the benefit in

fulfilling the law's purpose and the harm caused by limiting the constitutional right. *It is based on balancing* " (my italics).

34. Szabó v Hungary (2016) 63 EHRR 3 , para 68: "Indeed, it would defy the purpose of government efforts to keep terrorism at bay, thus restoring citizens' trust in their abilities to maintain public security, if the terrorist threat were paradoxically substituted for by a perceived threat of unfettered executive power intruding into citizens' private spheres by virtue of uncontrolled yet far reaching surveillance techniques and prerogatives. In this context the court also refers to the observations made by the Court of Justice of the European Union and, especially, the United Nations Special Rapporteur, emphasising the importance of adequate legislation of sufficient safeguards in the face of the authorities' enhanced technical possibilities to intercept private information."

35. I would nevertheless clarify that this requirement for a prior, independent review cannot, in my view, arise from article 8(3) of the Charter, since the Charter does not apply, as such, to national provisions governing access to retained data: see points 123–125 above.

36. United Nations Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism of 28 December 2009, A/HRC/13/37, para 62: "there must be no secret surveillance system that is not under the review of an effective oversight body and all interferences must be authorised through an independent body": see also para 51. See also the Report of the Special Rapporteur (United Nations, General Assembly) on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism of 23 September 2014, A/69/397, para 61.

37. As regards journalists' sources, the Court of Human Rights has emphasised the need for prior authorisation by an independent body, in as much as an ex post facto review cannot re-establish the confidentiality of such sources: see Telegraaf Media Nederland Landelijke Media BV v The Netherlands (2012) 34 BHRC 193 , para 101 and Szabó's case, para 77. In Kopp v Switzerland (1998) 27 EHRR 91 , para 74, which concerned the surveillance of a lawyer's telephone lines, the Court of Human Rights criticised the fact that an official within the authority was instructed to filter out information covered by professional privilege, without any oversight on the part of an independent court.

38. I would emphasise that this issue was not addressed by the court in Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources (Irish Human Rights Commission intervening) (Joined Cases C-293/12 and C-594/12) [2015] QB 127 .

39. Under Russian law, intercept material must be destroyed after six months of storage if the person concerned has not been charged with a criminal offence. The Court of Human Rights considered the six-month storage time limit set out in Russian law for such data reasonable. At the same time, it deplored the lack of any requirement to destroy immediately any data that are not relevant to the purpose for which they have been obtained and stated that the automatic storage for six months of clearly irrelevant data could not be considered justified under article 8 of the Human Rights Convention .

40. See, in particular, N v Staatssecretaris voor Veiligheid en Justitie [2016] 1 WLR 3027 , para 54 (the necessity of the measure was examined in paras 56–67, its proportionality in paras 68 and 69); CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (Nikolova, third parties) (Case C-83/14) [2015] All ER (EC) 1083 , para 123 (the necessity was addressed in paras 120–122, its proportionality in paras 123–127) and Sky Österreich GmbH v Österreichischer Rundfunk (Case C-283/11) [2013] All ER (EC) 633 , para 50 (the necessity of the measure was examined in paras 54–57, its proportionality in paras 58–67).

41. See Rivers, "Proportionality and variable intensity of review" in (2006) 65 CLJ 174, 198: "It is vital to realise that the test of balance has a totally different function from the test of necessity. The test of necessity rules out inefficient human rights limitations. It filters out cases in which the same level of realisation of a legitimate aim could be achieved at less cost to rights. By contrast, the test of balance is strongly evaluative. It asks whether the combination of certain levels of rights-enjoyment combined with the achievement of other interests is good or acceptable."

42. See Pirkker , *Proportionality Analysis and Models of Judicial Review* (2013), p 30: "In its simple form, one could state that proportionality stricto sensu leads to a weighing between competing values to assess which value should prevail."

43. The particular nature of the requirement of proportionality stricto sensu by comparison with the requirements of appropriateness and necessity may be illustrated by the following example. Let us suppose that a member state were to require every person residing within its territory to have a geolocation electronic chip injected into their

body, one that enabled the authorities to retrace the comings and goings of the wearer over the past year. Such a measure might be considered "necessary" if no other measure were capable of achieving the same degree of effectiveness in the fight against serious crime. However, to my mind, it would be disproportionate within a democratic society, since the disadvantages resulting from the interference with the rights to physical integrity, privacy and the protection of personal data would be disproportionate to the advantages offered in terms of the fight against serious crime.

44. The data retained include the identity of the sender and the recipient of every communication, and it would merely be necessary to cross-reference that data with a list of telephone numbers of psychologists practising in the country.

45. See United Nations Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism of 28 December 2009, A/HRC/13/37, para 42: "in Germany, research showed a chilling effect of data retention policies: 52% of persons interviewed said they probably would not use telecommunication for contact with drug counsellors, psychotherapists or marriage counsellors because of data retention laws."

46. Since the data retained include the location of the source and destination of every communication, any person initiating or receiving a communication during a demonstration could easily be identified using that data. Marc Goodman, an FBI and Interpol expert on the risks posed by new technologies, relates that, recently, the Ukrainian Government proceeded to identify, during an opposition demonstration, all mobile telephones located in the vicinity of street battles between law enforcers and government opponents. All those telephones then received a message which Mr Goodman describes as maybe the most Orwellian text message a government's ever sent: "Dear subscriber, you are registered as a participant in a mass disturbance": Goodman, *Future Crimes*, (2016), p 153. See also United National Human Rights Council, Report of the Special Rapporteur on The Promotion and Protection of the Right to Freedom of Opinion and Expression, 17 April 2013, A/HRC/23/40, para 75, and the Report of the United Nations High Commissioner for Human Rights (Human Rights Council) on The Right to Privacy in the Digital Age, 30 June 2014, A/HRC/27/37, para 3.

47. See the Report of the United Nations High Commissioner for Human Rights (Human Rights Council) on The Right to Privacy in the Digital Age, 30 June 2014, A/HRC/27/37, para 19: "in a similar vein, it has been suggested that the interception or collection of data about a communication, as opposed to the content of the communication, does not on its own constitute an interference with privacy. From the perspective of the right to privacy, this distinction is not persuasive. The aggregation of information commonly referred to as 'metadata' may give an insight into an individual's behaviour, social relationships, private preferences and identity *that go beyond even that conveyed by accessing the content of a private communication*" (my italics). See also the Report of the Special Rapporteur (United Nations, General Assembly) on The Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 23 September 2014, A/69/397, para 53.

48. See, in particular, United National Human Rights Council, Report of the Special Rapporteur on The Promotion and Protection of the Right to Freedom of Opinion and Expression, 17 April 2013, A/HRC/23/40, para 67: "Databases of communications data become vulnerable to theft, fraud and accidental disclosure."

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO
DEPARTMENT OF HEALTH, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015*

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 3–28.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 3–10.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the pe-

*Together with No. 14–562, *Tanco et al. v. Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al. v. Snyder, Governor of Michigan, et al.*, and No. 14–574, *Bourke et al. v. Beshear, Governor of Kentucky*, also on certiorari to the same court.

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tioners' own experiences. Pp. 3–6.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers v. Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” *Lawrence v. Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States v. Windsor*, 570 U. S. _____. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 6–10.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 10–27.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U. S. 438, 453; *Griswold v. Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving v. Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner v. Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship in-

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volving opposite-sex partners, as did *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, e.g., *Lawrence, supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., *Eisenstadt, supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 10–12.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence, supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner, supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence, supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, e.g., *Pierce v. Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor, supra*, at _____. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

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Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard v. Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 12–18.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki v. Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, e.g., *Kirchberg v. Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, e.g., *M. L. B. v. S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 18–22.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protec-

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tion Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 22–23.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 23–27.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

Cite as: 576 U. S. ____ (2015)

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Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14–562, 14–571 and 14–574

14–556 JAMES OBERGEFELL, ET AL., PETITIONERS
v.
RICHARD HODGES, DIRECTOR, OHIO
DEPARTMENT OF HEALTH, ET AL.;

14–562 VALERIA TANCO, ET AL., PETITIONERS
v.
BILL HASLAM, GOVERNOR OF
TENNESSEE, ET AL.;

14–571 APRIL DEBOER, ET AL., PETITIONERS
v.
RICK SNYDER, GOVERNOR OF MICHIGAN,
ET AL.; AND

14–574 GREGORY BOURKE, ET AL., PETITIONERS
v.
STEVE BESHEAR, GOVERNOR OF
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach,
a liberty that includes certain specific rights that allow

Opinion of the Court

persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, e.g., Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101.01 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder*, 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. ____ (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio,

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Cite as: 576 U. S. ____ (2015)

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Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” See *De Officiis* 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures,

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and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from

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Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two

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settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, *Public Vows: A History of Marriage and the Nation* 9–17 (2000); S. Coontz, *Marriage, A History* 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, *Commentaries on the Laws of England* 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes.

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Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, *Public Vows*; S. Coontz, *Marriage*; H. Hartog, *Man & Wife in America: A History* (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first *Diagnostic and Statistical Manual of Mental Disorders* in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See *Position Statement on Homosexuality and Civil*

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Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U. S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U. S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is

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defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as “only a legal union between one man and one woman as husband and wife.” 1 U. S. C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State’s Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States v. Windsor*, 570 U. S. ____ (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples “who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.” *Id.*, at ____ (slip op., at 14).

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F. 3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many

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thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, *The State of Marriage Equality in America, State-by-State Supp.* (2015).

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U. S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” *Poe v. Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradi-

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tion guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence, supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, e.g., *M. L. B. v. S. L. J.*, 519 U. S. 102, 116 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U. S. 632, 639–640 (1974); *Griswold, supra*, at 486; *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions,

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has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, e.g., *Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., *Eisenstadt*, *supra*, at 453-454; *Poe*, *supra*, at 542-553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra*, at 384 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would

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be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” *Zablocki, supra*, at 386.

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at ____– ____ (slip op., at 22–23). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra*, at 12 (“[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State”).

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U. S., at 485. Suggesting that marriage is a right “older than the Bill of Rights,” *Griswold* described marriage this way:

“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social

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projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95–96. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at ___ (slip op., at 14). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S., at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Meyer*, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U. S., at 384

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(quoting *Meyer, supra*, at 399). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor, supra*, at ____ (slip op., at 23). Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor, supra*, at ____ (slip op., at 23).

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of

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precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

"There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill*, 125 U. S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "a great public institution, giving character to our whole civil polity." *Id.*, at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, *Public Vows*. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the

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basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at ____ – ____ (slip op., at 15–16). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come

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the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997), which called for a “careful description” of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.*, at 789–792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566–567.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources

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alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (KENNEDY, J., concurring in judgment); *Bearden v. Georgia*, 461 U. S. 660, 665 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court

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first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U. S., at 12. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U. S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383-387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of cover-

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ture, see *supra*, at 6, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed v. Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State’s law, for example, provided in 1971 that “the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit.” Ga. Code Ann. §53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, e.g., *Kirchberg v. Feenstra*, 450 U. S. 455 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U. S. 142 (1980); *Califano v. Westcott*, 443 U. S. 76 (1979); *Orr v. Orr*, 440 U. S. 268 (1979); *Califano v. Goldfarb*, 430 U. S. 199 (1977) (plurality opinion); *Weinberger v. Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero v. Richardson*, 411 U. S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B. v. S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S., at 119–124. In *Eisenstadt v. Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S., at 446–454. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed steriliza-

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tion of habitual criminals. See 316 U. S., at 538–543.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U. S., at 575. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State “cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Id.*, at 578.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, e.g., *Zablocki*, *supra*, at 383–388; *Skinner*, 316 U. S., at 541.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No

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longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See *DeBoer*, 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented

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for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 572 U. S. ____ (2014), noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” *Id.*, at ____ – ____ (slip op., at 15–16). Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” *Id.*, at ____ (slip op., at 15). Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. *Id.*, at ____ (slip op., at 17). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638 (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” *Ibid.*

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It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U. S., at 186, 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.*, at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was “not correct when it was decided.” 539 U. S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners’ stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and

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Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen v. Herbert*, 755 F. 3d 1193, 1223 (CA10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they

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describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of *Obergefell* and *Arthur*, and by that of *DeKoe* and *Kostura*, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of “the most perplexing and distressing complication[s]” in the law of domestic relations. *Williams v. North Carolina*, 317 U. S. 287, 299 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and pro-

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mote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Appendix A to opinion of the Court

APPENDICES

A

State and Federal Judicial Decisions
Addressing Same-Sex Marriage**United States Courts of Appeals Decisions**

Adams v. Howerton, 673 F. 2d 1036 (CA9 1982)
Smelt v. County of Orange, 447 F. 3d 673 (CA9 2006)
Citizens for Equal Protection v. Bruning, 455 F. 3d 859 (CA8 2006)
Windsor v. United States, 699 F. 3d 169 (CA2 2012)
Massachusetts v. Department of Health and Human Services, 682 F. 3d 1 (CA1 2012)
Perry v. Brown, 671 F. 3d 1052 (CA9 2012)
Latta v. Otter, 771 F. 3d 456 (CA9 2014)
Baskin v. Bogan, 766 F. 3d 648 (CA7 2014)
Bishop v. Smith, 760 F. 3d 1070 (CA10 2014)
Bostic v. Schaefer, 760 F. 3d 352 (CA4 2014)
Kitchen v. Herbert, 755 F. 3d 1193 (CA10 2014)
DeBoer v. Snyder, 772 F. 3d 388 (CA6 2014)
Latta v. Otter, 779 F. 3d 902 (CA9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

United States District Court Decisions

Adams v. Howerton, 486 F. Supp. 1119 (CD Cal. 1980)
Citizens for Equal Protection, Inc. v. Bruning, 290 F. Supp. 2d 1004 (Neb. 2003)
Citizens for Equal Protection v. Bruning, 368 F. Supp. 2d 980 (Neb. 2005)
Wilson v. Ake, 354 F. Supp. 2d 1298 (MD Fla. 2005)
Smelt v. County of Orange, 374 F. Supp. 2d 861 (CD Cal. 2005)
Bishop v. Oklahoma ex rel. Edmondson, 447 F. Supp. 2d 1239 (ND Okla. 2006)

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Massachusetts v. Department of Health and Human Services, 698 F. Supp. 2d 234 (Mass. 2010)

Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (Mass. 2010)

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (ND Cal. 2010)

Dragovich v. Department of Treasury, 764 F. Supp. 2d 1178 (ND Cal. 2011)

Golinski v. Office of Personnel Management, 824 F. Supp. 2d 968 (ND Cal. 2012)

Dragovich v. Department of Treasury, 872 F. Supp. 2d 944 (ND Cal. 2012)

Windsor v. United States, 833 F. Supp. 2d 394 (SDNY 2012)

Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294 (Conn. 2012)

Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (Haw. 2012)

Sevcik v. Sandoval, 911 F. Supp. 2d 996 (Nev. 2012)

Merritt v. Attorney General, 2013 WL 6044329 (MD La., Nov. 14, 2013)

Gray v. Orr, 4 F. Supp. 3d 984 (ND Ill. 2013)

Lee v. Orr, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

Kitchen v. Herbert, 961 F. Supp. 2d 1181 (Utah 2013)

Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (SD Ohio 2013)

Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252 (ND Okla. 2014)

Bourke v. Beshear, 996 F. Supp. 2d 542 (WD Ky. 2014)

Lee v. Orr, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

Bostic v. Rainey, 970 F. Supp. 2d 456 (ED Va. 2014)

De Leon v. Perry, 975 F. Supp. 2d 632 (WD Tex. 2014)

Tanco v. Haslam, 7 F. Supp. 3d 759 (MD Tenn. 2014)

DeBoer v. Snyder, 973 F. Supp. 2d 757 (ED Mich. 2014)

Henry v. Himes, 14 F. Supp. 3d 1036 (SD Ohio 2014)

Latta v. Otter, 19 F. Supp. 3d 1054 (Idaho 2014)

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- Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (Ore. 2014)
Evans v. Utah, 21 F. Supp. 3d 1192 (Utah 2014)
Whitewood v. Wolf, 992 F. Supp. 2d 410 (MD Pa. 2014)
Wolf v. Walker, 986 F. Supp. 2d 982 (WD Wis. 2014)
Baskin v. Bogan, 12 F. Supp. 3d 1144 (SD Ind. 2014)
Love v. Beshear, 989 F. Supp. 2d 536 (WD Ky. 2014)
Burns v. Hickenlooper, 2014 WL 3634834 (Colo., July 23, 2014)
Bowling v. Pence, 39 F. Supp. 3d 1025 (SD Ind. 2014)
Brenner v. Scott, 999 F. Supp. 2d 1278 (ND Fla. 2014)
Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (ED La. 2014)
General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (WDNC 2014)
Hamby v. Parnell, 56 F. Supp. 3d 1056 (Alaska 2014)
Fisher-Borne v. Smith, 14 F. Supp. 3d 695 (MDNC 2014)
Majors v. Horne, 14 F. Supp. 3d 1313 (Ariz. 2014)
Connolly v. Jeanes, ____ F. Supp. 3d ____, 2014 WL 5320642 (Ariz., Oct. 17, 2014)
Guzzo v. Mead, 2014 WL 5317797 (Wyo., Oct. 17, 2014)
Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 157 (PR 2014)
Marie v. Moser, ____ F. Supp. 3d ____, 2014 WL 5598128 (Kan., Nov. 4, 2014)
Lawson v. Kelly, 58 F. Supp. 3d 923 (WD Mo. 2014)
McGee v. Cole, ____ F. Supp. 3d ____, 2014 WL 5802665 (SD W. Va., Nov. 7, 2014)
Condon v. Haley, 21 F. Supp. 3d 572 (S.C. 2014)
Bradacs v. Haley, 58 F. Supp. 3d 514 (S.C. 2014)
Rolando v. Fox, 23 F. Supp. 3d 1227 (Mont. 2014)
Jernigan v. Crane, ____ F. Supp. 3d ____, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)
Campaign for Southern Equality v. Bryant, ____ F. Supp. 3d ____, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)
Inniss v. Aderhold, ____ F. Supp. 3d ____, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

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Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862 (S. D., 2015)

Caspar v. Snyder, ___ F. Supp. 3d ___, 2015 WL 224741 (E.D. Mich., Jan. 15, 2015)

Searcey v. Strange, 2015 U. S. Dist. LEXIS 7776 (SD Ala., Jan. 23, 2015)

Strawser v. Strange, 44 F. Supp. 3d 1206 (SD Ala. 2015)

Waters v. Ricketts, 48 F. Supp. 3d 1271 (Neb. 2015)

State Highest Court Decisions

Baker v. Nelson, 291 Minn. 310, 191 N. W. 2d 185 (1971)

Jones v. Hallahan, 501 S. W. 2d 588 (Ky. 1973)

Baehr v. Lewin, 74 Haw. 530, 852 P. 2d 44 (1993)

Dean v. District of Columbia, 653 A. 2d 307 (D. C. 1995)

Baker v. State, 170 Vt. 194, 744 A. 2d 864 (1999)

Brause v. State, 21 P. 3d 357 (Alaska 2001) (ripeness)

Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 (2003)

In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

Li v. State, 338 Or. 376, 110 P. 3d 91 (2005)

Cote-Whitacre v. Department of Public Health, 446 Mass. 350, 844 N. E. 2d 623 (2006)

Lewis v. Harris, 188 N. J. 415, 908 A. 2d 196 (2006)

Andersen v. King County, 158 Wash. 2d 1, 138 P. 3d 963 (2006)

Hernandez v. Robles, 7 N. Y. 3d 338, 855 N. E. 2d 1 (2006)

Conaway v. Deane, 401 Md. 219, 932 A. 2d 571 (2007)

In re Marriage Cases, 43 Cal. 4th 757, 183 P. 3d 384 (2008)

Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A. 2d 407 (2008)

Strauss v. Horton, 46 Cal. 4th 364, 207 P. 3d 48 (2009)

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Varnum v. Brien, 763 N. W. 2d 862 (Iowa 2009)

Griego v. Oliver, 2014–NMSC–003, ____ N. M. ____, 316 P. 3d 865 (2013)

Garden State Equality v. Dow, 216 N. J. 314, 79 A. 3d 1036 (2013)

Ex parte State ex rel. Alabama Policy Institute, ____ So. 3d ____, 2015 WL 892752 (Ala., Mar. 3, 2015)

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B

State Legislation and Judicial Decisions
Legalizing Same-Sex Marriage**Legislation**

Del. Code Ann., Tit. 13, §129 (Cum. Supp. 2014)
 D. C. Act No. 18–248, 57 D. C. Reg. 27 (2010)
 Haw. Rev. Stat. §572 –1 (2006) and 2013 Cum. Supp.)
 Ill. Pub. Act No. 98–597
 Me. Rev. Stat. Ann., Tit. 19, §650–A (Cum. Supp. 2014)
 2012 Md. Laws p. 9
 2013 Minn Laws p. 404
 2009 N. H. Laws p. 60
 2011 N. Y Laws p. 749
 2013 R. I. Laws p. 7
 2009 Vt. Acts & Resolves p. 33
 2012 Wash. Sess. Laws p. 199

Judicial Decisions

Goodridge v. Department of Public Health, 440 Mass.
 309, 798 N. E. 2d 941 (2003)
Kerrigan v. Commissioner of Public Health, 289 Conn.
 135, 957 A. 2d 407 (2008)
Varnum v. Brien, 763 N. W. 2d 862 (Iowa 2009)
Griego v. Oliver, 2014–NMSC–003, ___ N. M. ___, 316
 P. 3d 865 (2013)
Garden State Equality v. Dow, 216 N. J. 314, 79 A. 3d
 1036 (2013)

Cite as: 576 U. S. ____ (2015)

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ROBERTS, C. J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14–562, 14–571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*

RICHARD HODGES, DIRECTOR, OHIO
DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*

BILL HASLAM, GOVERNOR OF
TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 *v.*

RICK SNYDER, GOVERNOR OF MICHIGAN,
ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*

STEVE BESHEAR, GOVERNOR OF
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA
and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social
policy and considerations of fairness. They contend that
same-sex couples should be allowed to affirm their love
and commitment through marriage, just like opposite-sex
couples. That position has undeniable appeal; over the

ROBERTS, C. J., dissenting

past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

ROBERTS, C. J., dissenting

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante*, at 11, 23. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner v. New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante*, at 19. I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the “right to marry” and the imperative of “marriage equality.” There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes “marriage,” or—more precisely—*who decides* what constitutes “marriage”?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not “the end” of these cases, *ante*, at 4, I would not “sweep away what has so long been settled” without showing greater respect for all that preceded us. *Town of Greece v. Galloway*, 572 U. S. ___, ___ (2014) (slip op., at 8).

A

As the majority acknowledges, marriage “has existed for millennia and across civilizations.” *Ante*, at 3. For all those millennia, across all those civilizations, “marriage” referred to only one relationship: the union of a man and a woman. See *ante*, at 4; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, “until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.” *United States v. Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 13).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbi-

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ans. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, *A History of Marriage Systems* 2 (1988); cf. M. Cicero, *De Officiis* 57 (W. Miller transl. 1913) (“For since the reproductive instinct is by nature’s gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.”).

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, “Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.” J. Q. Wilson, *The Marriage Problem* 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at “the time of the Nation’s founding [marriage] was understood to be a voluntary contract between

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a man and a woman.” *Ante*, at 6. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between “husband and wife” as one of the “great relations in private life,” and philosophers like John Locke, who described marriage as “a voluntary compact between man and woman” centered on “its chief end, procreation” and the “nourishment and support” of children. 1 W. Blackstone, *Commentaries* *410; J. Locke, *Second Treatise of Civil Government* §§78–79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family “was a given: its structure, its stability, roles, and values accepted by all.” Forte, *The Framers’ Idea of Marriage and Family*, in *The Meaning of Marriage* 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with “[t]he whole subject of the domestic relations of husband and wife.” *Windsor*, 570 U. S., at ___ (slip op., at 17) (quoting *In re Burrus*, 136 U. S. 586, 593–594 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer v. Snyder*, 772 F. 3d 388, 396–399 (CA6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones v. Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of “marriage” went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as “the legal union of a man and woman for life,” which served the purposes of “preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the

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maintenance and education of children.” 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as “a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex.” J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black’s Law Dictionary defined marriage as “the civil status of one man and one woman united in law for life.” Black’s Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court’s precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as “the union for life of one man and one woman,” *Murphy v. Ramsey*, 114 U. S. 15, 45 (1885), which forms “the foundation of the family and of society, without which there would be neither civilization nor progress,” *Maynard v. Hill*, 125 U. S. 190, 211 (1888). We later described marriage as “fundamental to our very existence and survival,” an understanding that necessarily implies a procreative component. *Loving v. Virginia*, 388 U. S. 1, 12 (1967); see *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). More recent cases have directly connected the right to marry with the “right to procreate.” *Zablocki v. Redhail*, 434 U. S. 374, 386 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant’s separate status. Racial restrictions on marriage, which “arose as an incident to slavery” to promote “White Supremacy,” were repealed by many States and ultimately struck down by this Court.

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Loving, 388 U. S., at 6–7.

The majority observes that these developments “were not mere superficial changes” in marriage, but rather “worked deep transformations in its structure.” *Ante*, at 6–7. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, “Marriage is the union of a man and a woman, where the woman is subject to coverture.” The majority may be right that the “history of marriage is one of both continuity and change,” but the core meaning of marriage has endured. *Ante*, at 6.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker v. Nelson*, 409 U. S. 810 (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has

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shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic “momentum” in favor of “expand[ing] the definition of marriage to include gay couples,” but concluded that petitioners had not made “the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.” 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based

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almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante*, at 12. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*, 198 U. S. 45. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante*, at 3, 14. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno v. Flores*, 507 U. S. 292, 302 (1993). The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder v. Massachusetts*, 291

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U. S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as “fundamental”—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges “exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v. Glucksberg*, 521 U. S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) (“One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.”).

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.” *Id.*, at 450. In a dissent that has outlasted the majority opinion, Justice Curtis explained that when the “fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical

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opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.*, at 621.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U. S., at 60, 61. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.*, at 58.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.*, at 72 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.*, at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embody-

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ing them conflict with the Constitution.” *Id.*, at 75–76.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that “[t]he criterion of constitutionality is not whether we believe the law to be for the public good.” *Adkins v. Children’s Hospital of D. C.*, 261 U. S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected “liberty,” the *Lochner* line of cases left “no alternative to regarding the court as a . . . legislative chamber.” L. Hand, *The Bill of Rights* 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. “The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely,” we later explained, “has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” *Ferguson v. Skrupa*, 372 U. S. 726, 730 (1963); see *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 423 (1952) (“we do not sit as a super-legislature to weigh the wisdom of legislation”). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them “unwise, improvident, or out of harmony with a particular school of thought.” *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*’s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for “judicial self-restraint.” *Collins v. Harker Heights*, 503 U. S. 115, 125 (1992). Our precedents have required that implied fundamental rights be “objec-

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tively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U. S., at 720–721 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, e.g., *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U. S. 52, 72 (2009); *Flores*, 507 U. S., at 303; *United States v. Salerno*, 481 U. S. 739, 751 (1987); *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); see also *id.*, at 544 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel v. Granville*, 530 U. S. 57, 96–101 (2000) (KENNEDY, J., dissenting) (consulting "[o]ur Nation's history, legal traditions, and practices" and concluding that "[w]e owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting *Glucksberg*, 521 U. S., at 721)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante*, at 18. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins*, 503 U. S., at 125, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore*, 431 U. S., at 504, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identify-

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ing fundamental rights, *ante*, at 10–11, does not provide a meaningful constraint on a judge, for “what he is really likely to be ‘discovering,’ whether or not he is fully aware of it, are his own values,” J. Ely, *Democracy and Distrust* 44 (1980). The only way to ensure restraint in this delicate enterprise is “continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers.” *Griswold v. Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority’s driving themes are that marriage is desirable and petitioners desire it. The opinion describes the “transcendent importance” of marriage and repeatedly insists that petitioners do not seek to “demean,” “devalue,” “denigrate,” or “disrespect” the institution. *Ante*, at 3, 4, 6, 28. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners’ wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental “right to marry.” *Turner v. Safley*, 482 U. S. 78, 95 (1987); *Zablocki*, 434 U. S., at 383; see *Loving*, 388 U. S., at 12. These cases

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do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison.*" Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race.*" See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post*, at 11–12, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante*, at 11.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor*, 570 U. S., at ____ (ALITO, J., dissenting) (slip op., at 8) ("What *Windsor* and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a

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single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that “there are other, more instructive precedents” informing the right to marry. *Ante*, at 12. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental “right of privacy.” *Griswold*, 381 U. S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.*, at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of “the police to search the sacred precincts of marital bedrooms.” *Id.*, at 485. In the Court’s view, such laws infringed the right to privacy in its most basic sense: the “right to be let alone.” *Eisenstadt v. Baird*, 405 U. S. 438, 453–454, n. 10 (1972) (internal quotation marks omitted); see *Olmstead v. United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence v. Texas*, 539 U. S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting “unwarranted government intrusions” that “touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home.” *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is “condemned to live in loneli-

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ness" by the laws challenged in these cases—no one. *Ante*, at 28. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe v. Ullman*, 367 U. S. 497 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.*, at 542. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.*, at 546.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989); *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 35–37 (1973); *post*, at 9–13 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

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3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the “careful” approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 18 (quoting 521 U. S., at 721). It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority’s methodology: *Lochner v. New York*, 198 U. S. 45. The majority opens its opinion by announcing petitioners’ right to “define and express their identity.” *Ante*, at 1–2. The majority later explains that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” *Ante*, at 12. This free-wheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor.” *Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own “reasoned judgment,” informed by its “new insight” into the “nature of injustice,” which was invisible to all who came before but has become clear “as we learn [the] meaning” of liberty. *Ante*, at 10, 11. The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that “it would disparage their choices and diminish their personhood to deny them this right.” *Ante*, at 19. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences

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adopted in *Lochner*. See 198 U. S., at 61 (“We do not believe in the soundness of the views which uphold this law,” which “is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best”).

The majority recognizes that today’s cases do not mark “the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights.” *Ante*, at 25. On that much, we agree. The Court was “asked”—and it agreed—to “adopt a cautious approach” to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority’s position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14-4117 (CA10). Although the majority randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” *ante*, at 13, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their

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children would otherwise “suffer the stigma of knowing their families are somehow lesser,” *ante*, at 15, why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” *ante*, at 22, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? *Newsweek*, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian “Throuple” Expecting First Child, *N. Y. Post*, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 *Emory L. J.* 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State “doesn’t have such an institution.” *Tr. of Oral Arg. on Question 2*, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would “pose no risk of harm to themselves or third parties.” *Ante*, at 27. This argument again echoes *Lochner*, which relied on its assessment that “we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.” 198 U. S., at 57.

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Then and now, this assertion of the “harm principle” sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of “due process.” There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes’s dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill’s *On Liberty* any more than it enacts Herbert Spencer’s *Social Statics*. See Randolph, Before *Roe v. Wade*: Judge Friendly’s Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol’y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority’s understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country’s entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the “nature of injustice is that we may not always see it in our own times.” *Ante*, at 11. As petitioners put it, “times can blind.” Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. “The

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past is never dead. It's not even past." W. Faulkner, *Requiem for a Nun* 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 20. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is case-book doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, *Constitutional Law* 453 (7th ed. 2013). The majority's approach today is different:

"Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 19.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 22. Yet the majority fails to provide even a single sentence explaining how the Equal

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Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 197 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U. S., at 585 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn. v. White*, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the

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people, who are responsible for making “new dimensions of freedom . . . apparent to new generations,” for providing “formal discourse” on social issues, and for ensuring “neutral discussions, without scornful or disparaging commentary.” *Ante*, at 7–9.

Nowhere is the majority’s extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been “extensive litigation,” “many thoughtful District Court decisions,” “countless studies, papers, books, and other popular and scholarly writings,” and “more than 100” *amicus* briefs in these cases alone. *Ante*, at 9, 10, 23. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers’ “better informed understanding” of “a liberty that remains urgent in our own era.” *Ante*, at 19. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after “a quite extensive discussion.” *Ante*, at 8. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. “Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unre-

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solved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.” Rehnquist, *The Notion of a Living Constitution*, 54 *Texas L. Rev.* 693, 700 (1976). As a plurality of this Court explained just last year, “It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.” *Schuette v. BAMN*, 572 U. S. ___, ___ – ___ (2014) (slip op., at 16–17).

The Court’s accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. “That is exactly how our system of government is supposed to work.” *Post*, at 2–3 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding

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this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, “The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.” Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today’s decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for

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religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*, at 27. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante*, at 19. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ante*, at 19. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring defini-

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tion of marriage—have acted to “lock . . . out,” “disparage,” “disrespect and subordinate,” and inflict “[d]ignitary wounds” upon their gay and lesbian neighbors. *Ante*, at 17, 19, 22, 25. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post*, at 6–7 (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s “better informed understanding” as bigoted. *Ante*, at 19.

In the face of all this, a much different view of the Court’s role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

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SUPREME COURT OF THE UNITED STATES

Nos. 14-556, 14-562, 14-571 and 14-574

JAMES OBERGEFELL, ET AL., PETITIONERS
14-556 v.

RICHARD HODGES, DIRECTOR, OHIO
DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14-562 v.

BILL HASLAM, GOVERNOR OF
TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14-571 *v.*

RICK SNYDER, GOVERNOR OF MICHIGAN,
ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14-574 v.

STEVE BESHEAR, GOVERNOR OF
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance.

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Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.¹ Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of govern-

¹Brief for Respondents in No. 14-571, p. 14.

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ment is supposed to work.²

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws “impairing the Obligation of Contracts,”³ denying “Full Faith and Credit” to the “public Acts” of other States,⁴ prohibiting the free exercise of religion,⁵ abridging the freedom of speech,⁶ infringing the right to keep and bear arms,⁷ authorizing unreasonable searches and seizures,⁸ and so forth. Aside from these limitations, those powers “reserved to the States respectively, or to the people”⁹ can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today’s opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

“[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.”¹⁰

² Accord, *Schuette v. BAMN*, 572 U. S. ___, ___ (2014) (plurality opinion) (slip op., at 15–17).

³ U. S. Const., Art. I, §10.

⁴ Art. IV, §1.

⁵ Amdt. 1.

⁶ *Ibid.*

⁷ Amdt. 2.

⁸ Amdt. 4.

⁹ Amdt. 10.

¹⁰ *United States v. Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 16) (internal quotation marks and citation omitted).

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"[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."¹¹

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.¹² We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its “reasoned judgment,” thinks the Fourteenth Amendment ought to protect.¹³ That is so because “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its

¹¹ *Id.*, at ____ (slip op., at 17).

¹² See *Town of Greece v. Galloway*, 572 U. S. ____–____ (2014) (slip op., at 7–8).

¹³ *Ante*, at 10.

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dimensions”¹⁴ One would think that sentence would continue: “. . . and therefore they provided for a means by which the People could amend the Constitution,” or perhaps “. . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation.” But no. What logically follows, in the majority’s judge-empowering estimation, is: “and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”¹⁵ The “we,” needless to say, is the nine of us. “History and tradition guide and discipline [our] inquiry but do not set its outer boundaries.”¹⁶ Thus, rather than focusing on *the People’s* understanding of “liberty”—at the time of ratification or even today—the majority focuses on four “principles and traditions” that, *in the majority’s view*, prohibit States from defining marriage as an institution consisting of one man and one woman.¹⁷

This is a naked judicial claim to legislative—indeed, *super-legislative*—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices’ “reasoned judgment.” A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section

¹⁴ *Ante*, at 11.

¹⁵ *Ibid.*

¹⁶ *Ante*, at 10–11.

¹⁷ *Ante*, at 12–18.

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of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers¹⁸ who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans¹⁹), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that

¹⁸The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14-571 and 14-574, pp. 1-5.

¹⁹See Pew Research Center, *America's Changing Religious Landscape* 4 (May 12, 2015).

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every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.²⁰ They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago,²¹ cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.²² Of course the opinion's showy profundities are often

²⁰ *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003).

²¹ *Windsor*, 570 U. S., at ____ (ALITO, J., dissenting) (slip op., at 7).

²² If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that

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profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."²³ (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."²⁴ (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right."²⁵ (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court

allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

²³ *Ante*, at 13.

²⁴ *Ante*, at 19.

²⁵ *Ibid*.

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really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses “converge in the identification and definition of [a] right,” that is only because the majority’s likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.

* * *

Hubris is sometimes defined as o’erweening pride; and pride, we know, goeth before a fall. The Judiciary is the “least dangerous” of the federal branches because it has “neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm” and the States, “even for the efficacy of its judgments.”²⁶ With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the “reasoned judgment” of a bare majority of this Court—we move one step closer to being reminded of our impotence.

²⁶The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

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SUPREME COURT OF THE UNITED STATES

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JAMES OBERGEFELL, ET AL., PETITIONERS
14-556 v.
RICHARD HODGES, DIRECTOR, OHIO
DEPARTMENT OF HEALTH, ET AL.;

14-562 VALERIA TANCO, ET AL., PETITIONERS
v.
BILL HASLAM, GOVERNOR OF
TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14-571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN,
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GREGORY BOURKE, ET AL., PETITIONERS
14-574 v.
STEVE BESHEAR, GOVERNOR OF
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our

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Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a “liberty” that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority’s decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing “due process” before a person is deprived of his “life, liberty, or property.” I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald v. Chicago*, 561 U. S. 742, 811–812 (2010) (THOMAS, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever “process” is “due” before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, §1. Worse, it invites judges to do exactly what the majority has done here—“roa[m] at large in the constitutional field’ guided only by their personal views” as to the “‘fundamental rights’” protected by that document. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 953, 965 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part) (quoting *Griswold v. Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue

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that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue “beyond the reach of the normal democratic process.” Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a “bare majority” of this Court, *ante*, at 25, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only “due process” is but further evidence of the danger of substantive due process.¹

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of “substantive” or “procedural” due process—a party must first identify a deprivation of “life, liberty, or property.” The majority claims these state laws deprive petitioners of “liberty,” but the concept of “liberty” it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

¹The majority states that the right it believes is “part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.” *Ante*, at 19. Despite the “synergy” it finds “between th[ese] two protections,” *ante*, at 20, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

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A

1

As used in the Due Process Clauses, "liberty" most likely refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, *Commentaries on the Laws of England* 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See *Davidson v. New Orleans*, 96 U.S. 97, 101–102 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A. Howard, *Magna Carta: Text and Commentary* 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due proces of the common law." *Id.*, at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, e.g., *ibid.*, William Blackstone referred to this provision as protecting the "absolute rights

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of every Englishman.” 1 Blackstone 123. And he formulated those absolute rights as “the right of personal security,” which included the right to life; “the right of personal liberty”; and “the right of private property.” *Id.*, at 125. He defined “the right of personal liberty” as “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” *Id.*, at 125, 130.²

The Framers drew heavily upon Blackstone’s formulation, adopting provisions in early State Constitutions that replicated Magna Carta’s language, but were modified to refer specifically to “life, liberty, or property.”³ State

²The seeds of this articulation can also be found in Henry Care’s influential treatise, *English Liberties*. First published in America in 1721, it described the “three things, which the Law of *England* . . . principally regards and taketh Care of,” as “*Life, Liberty and Estate*,” and described habeas corpus as the means by which one could procure one’s “Liberty” from imprisonment. The Habeas Corpus Act, comment., in *English Liberties*, or the Free-born Subject’s Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word “Liberties” by itself more broadly, see, e.g., *id.*, at 7, 34, 56, 58, 60, he used “Liberty” in a narrow sense when placed alongside the words “Life” or “Estate,” see, e.g., *id.*, at 185, 200.

³Maryland, North Carolina, and South Carolina adopted the phrase “life, liberty, or property” in provisions otherwise tracking Magna Carta: “That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.” Md. Const., Declaration of Rights, Art. XXI (1776), in 3 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688* (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.*, at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.*, at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta’s framework: “[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.” Mass. Const., pt. I, Art. XII (1780), in 3 *id.*, at 1891; see also

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decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. See Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431, 441-445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.*, at 444-445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property"*, 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.*, at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado v. California*, 110 U. S. 516, 534-535 (1884). Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." *Ibid.* And this

N. H. Const., pt. I, Art. XV (1784), in 4 *id.*, at 2455.

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Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn v. Illinois*, 94 U. S. 113 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.*, at 123–124, and implicitly rejected the dissent's argument that "liberty" encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id.*, at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, *The Ideological Origins of the American Revolution* 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, *Second Treatise of Civil Government*, §4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See

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id., §97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom “to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it.” *Id.*, §22, at 13.⁴

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the *Boston Gazette*, for example, declared that “Liberty in the *State of Nature*” was the “inherent natural Right” “of each Man” “to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of,” but that, “in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul.” *Boston Gazette and Country Journal*, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C.

⁴Locke’s theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that “natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature” and described civil liberty as that “which leaves the subject entire master of his own conduct,” except as “restrained by human laws.” 1 Blackstone 121–122. And in a “treatise routinely cited by the Founders,” *Zivotofsky v. Kerry*, *ante*, at 5 (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherford wrote, “By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions.” 1 T. Rutherford, *Institutes of Natural Law* 146 (1754). Rutherford explained that “[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God,” and that “[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them.” *Id.*, at 147–148.

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Hyneman & D. Lutz, *American Political Writing During the Founding Era 1760–1805*, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L. J.* 907, 918–919 (1993). As one later commentator observed, “[L]iberty in the eighteenth century was thought of much more in relation to ‘negative liberty’; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power.” J. Reid, *The Concept of Liberty in the Age of the American Revolution* 56 (1988). Or as one scholar put it in 1776, “[T]he common idea of liberty is merely negative, and is only the *absence of restraint*.” R. Hey, *Observations on the Nature of Civil Liberty and the Principles of Government* §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals “from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth.” Downer, *A Discourse at the Dedication of the Tree of Liberty*, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define “liberty” as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of “liberty,” that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They

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have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader

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definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, “The first society was between man and wife, which gave beginning to that between parents and children.” Locke §77, at 39; see also J. Wilson, *Lectures on Law*, in 2 *Collected Works of James Wilson* 1068 (K. Hall and M. Hall eds. 2007) (concluding “that to the institution of marriage the true origin of society must be traced”). Petitioners misunderstand the institution of marriage when they say that it would “mean little” absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of “liberty” beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving v. Virginia*, 388 U. S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.*, at 2–3.⁵ They were each sen-

⁵The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. “America's earliest laws against interracial sex and marriage were spawned by slavery.” P. Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between “freeborne English women” and “Negro Sla[v]es” was passed as part of the very act that authorized lifelong

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tenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.*, at 3.⁶ In a similar vein, *Zablocki v. Redhail*, 434 U. S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from “marry[ing] in Wisconsin or elsewhere” because of his outstanding child-support obligations, *id.*, at 387; see *id.*, at 377–378. And *Turner v. Safley*, 482 U. S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.*, at 82. In none of those cases were individuals denied solely governmental

slavery in the colony. *Id.*, at 19–20. Virginia’s antimiscegenation laws likewise were passed in a 1691 resolution entitled “An act for suppressing outlying Slaves.” Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). “It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy.” Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire “to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.” *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

⁶The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment’s Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving v. Virginia*, O.T. 1966, No. 395, pp. 12–16.

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recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante*, at 2. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante*, at 19,—better informed, we must assume, than that of the people who ratified the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,'" *Reid v. Covert*, 354 U. S. 1, 9 (1957) (plurality opinion), not "Thou shalt provides."

III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke §99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.*, §22, at 13; see also Hey §§52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can

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adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents of a State would agree. See Locke §98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14-571, pp. 1a-7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422-1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established

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religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U. S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, e.g., Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*; Conn. Gen. Stat. §52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh-Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante*, at 27. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious

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practice.⁷

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the “dignity” of same-sex couples. *Ante*, at 3, 13, 26, 28.⁸ The flaw in that reasoning, of course, is that the Constitution contains no “dignity” Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal”

⁷Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §20-60 (1960).

⁸The majority also suggests that marriage confers “nobility” on individuals. *Ante*, at 3. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more “noble” than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

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and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority’s musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State. Today’s decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on “due process” to afford substantive rights, disregards the most plausible

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understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

¹ I use the phrase "recognize marriage" as shorthand for issuing mar-

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these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today’s majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that “liberty” under the Due Process Clause should be understood to protect only those rights that are “deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U. S. 701, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor*, 570 U. S. ___, ___ (2013) (ALITO, J., dissenting) (slip op., at 7). Indeed:

“In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass.

riage licenses and conferring those special benefits and obligations provided under state law for married persons.

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309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

“What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.” *Id.*, at ____ (slip op., at 7–8) (footnote omitted).

For today’s majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States

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encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.² This de-

²See, e.g., Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at <http://www.cdc.gov/nchs/data/nvsr/nvsr64/>

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velopment undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

"The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

"We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some

nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, *Changing Patterns of Non-martial Childbearing in the United States*, NCHS Data Brief, No. 18 (May 2009), online at <http://www.cdc.gov/nchs/data/databrief/db18.pdf>.

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time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

“At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.” 570 U. S., at ____ (dissenting opinion) (slip op., at 8–10) (citations and footnotes omitted).

III

Today’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E.g., ante*, at 11–13. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

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Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante*, at 26–27. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that

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preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

Status:  Positive or Neutral Judicial Treatment

***1230 Regina (GC) v Commissioner of Police of the Metropolis (Liberty and another intervening)**

Regina (C) v Same (Same intervening)

Supreme Court

18 May 2011

[2011] UKSC 21

[2011] 1 W.L.R. 1230

Lord Phillips of Worth Matravers PSC, Lord Judge CJ , Lord Rodger of Earlsferry , Baroness Hale of Richmond , Lord Brown of Eaton-under-Heywood , Lord Kerr of Tonaghmore , Lord Dyson JJSC

2011 Jan 31; Feb 1; May 18

Police—Powers—Retention of evidence—Police taking fingerprints and DNA samples from suspects—Suspects subsequently acquitted or not proceeded against—Statutory provision permitting retention of biometric data after purpose for which taken fulfilled—Whether compatible with Convention right to respect for private life—National police policy to retain biometric data indefinitely except in exceptional circumstances—Police refusing to destroy suspects' fingerprint records and sample in accordance with policy—Whether policy incompatible with Convention right—Whether declaration of incompatibility to be granted—Police and Criminal Evidence Act 1984 (c 60), s 64(1A) (as inserted by Criminal Justice and Police Act 2001 (c 16), s 82(2) and amended by Serious Organised Crime and Police Act 2005 (c 15), ss 117(7), 118(4)(a))— Human Rights Act 1998 (c 42), s 3, Sch 1, Pt I, art 8

The claimant in the first case was arrested on suspicion of common assault and his fingerprints and a DNA sample were taken. He was subsequently informed by the police that no further action would be taken against him. The claimant in the second case was arrested on suspicion of rape, harassment and fraud and his fingerprints and a DNA sample were taken. No further action was taken in respect of the harassment and fraud allegations and he was acquitted of rape. The claimants requested the police to destroy their fingerprints and DNA samples. The Commissioner of Police of the Metropolis refused their requests in accordance with guidelines issued by the Association of Chief Police Officers ("ACPO"), which provided that the discretion in section 64(1A) of the Police and Criminal Evidence Act 1984¹, as amended, to retain fingerprints or samples after they had fulfilled the purposes for which they had been taken, in order to be used, inter alia, for the prevention and detection of crime, should be exercised for an indefinite period save in exceptional circumstances. The claimants each sought judicial review of the commissioner's decisions, relying in particular on a decision of the European Court of Human Rights that the blanket and indiscriminate nature of the powers of retention under

section 64(1A) and the ACPO guidelines was an unjustified interference with an individual's right to respect for his private life under article 8.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998². *1231 The Divisional Court of the Queen's Bench Division, holding itself bound by an earlier decision of the House of Lords which conflicted with the decision of the European court, dismissed the claims but granted the claimants a certificate under section 12(1) of the Administration of Justice Act 1969 for appeal direct to the Supreme Court. On the hearing of the appeal, the court was informed that the Government had introduced a Bill containing legislative proposals aimed at achieving a system for the retention of biometric data which was compatible with article 8.

On the appeals—

Held, allowing the appeals, (1) that, in the light of the European court's decision, the indefinite retention of the claimants' data was an unjustified interference with their rights under article 8.1 of the Convention (post, paras 15, 53, 64, 74, 77, 103, 138).

S and Marper v United Kingdom (2008) 48 EHRR 1169, GC applied.

R (S) v Chief Constable of the South Yorkshire Police [2004] 1 WLR 2196, HL(E) departed from.

(2) (Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood JJSC dissenting) that Parliament, in conferring a discretion on the police to retain biometric data under section 64(1A) of the 1984 Act, had not specified how the statutory purposes were to be fulfilled and was not to be taken to have intended that they should be achieved in a manner which was incompatible with article 8; that section 64(1A) permitted a policy which was less far reaching than the ACPO guidelines, was compatible with article 8 and, nevertheless, promoted the statutory purposes; that, therefore, it was possible to read and give effect to section 64(1A), in accordance with section 3 of the Human Rights Act 1998, in a way which was compatible with the Convention; that, since Parliament was already seized of the matter, it was neither just nor appropriate to make an order requiring a change in the legislative scheme within a specific period or for the destruction of data which it might be lawful to retain under the scheme which Parliament produced; and that, accordingly, the only appropriate order was a declaration that the present ACPO guidelines were unlawful because they were incompatible with the Convention (post, paras 24–27, 28, 35, 39, 42–44, 46, 48–49, 52, 53, 55, 57–60, 64, 65, 69–70, 72–73, 74, 80–81, 85–86, 88–92).

Per Lord Phillips of Worth Matravers PSC, Lord Judge CJ and Lord Dyson JSC. If Parliament does not produce revised guidelines within a reasonable time the claimants will be able to seek judicial review of the continuing retention of their data under the unlawful ACPO guidelines and their claims will be likely to succeed (post, paras 49, 53, 74).

Decision of the Divisional Court of the Queen's Bench Division [2010] EWHC 2225 (Admin); [2010] HRLR 870, DC reversed.

The following cases are referred to in the judgments:

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL(E)
 Attorney General v Antigua Times Ltd [1976] AC 16; [1975] 3 WLR 232; [1975] 3 All ER 81, PC
 Attorney General's Reference (No 3 of 1999) [2001] 2 AC 91; [2001] 2 WLR 56; [2001] 1 All ER 577, HL(E)
 Bellinger v Bellinger (Lord Chancellor intervening) [2003] UKHL 21; [2003] 2 AC 467; [2003] 2 WLR 1174; [2003] 2 All ER 593, HL(E)
 British Broadcasting Corp'n, In re [2009] UKHL 34; [2010] 1 AC 145; [2009] 3 WLR 142; [2010] 1 All ER 235, HL(E)
 Car Owners' Mutual Insurance Co Ltd v Treasurer of the Commonwealth of Australia [1970] AC 527; [1969] 3 WLR 374, PC ***1232**
***1232**

Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening) [2008] UKHL 57; [2009] AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)
 Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
 Greens and MT v United Kingdom (Application Nos 60041/08 and 60054/08) (unreported) given 23 November 2010, ECtHR
 Julius v Oxford (Bishop of) (1880) 5 App Cas 214, HL(E)
 Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2010] UKSC 45; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)
 Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E)
 R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)
 R (Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29; [2005] 1 WLR 1681; [2006] 1 All ER 487, HL(E)
 R (L) v Comr of Police of the Metropolis (Secretary of State for the Home Department intervening) [2009] UKSC 3; [2010] 1 AC 410; [2009] 3 WLR 1056; [2010] PTSR 245; [2010] 1 All ER 113, SC(E)
 R (S) v Chief Constable of the South Yorkshire Police [2004] UKHL 39; [2004] 1 WLR 2196; [2004] 4 All ER 193, HL(E)
 S (Minors) (Care Order: Implementation of Care Plan), In re [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192, HL(E)
 S and Marper v United Kingdom (2008) 48 EHRR 1169, GC
 Sheldrake v Director of Public Prosecutions [2004] UKHL 43; [2005] 1 AC 264; [2004] 3 WLR 976; [2005] 1 All ER 237, HL(E)
 Silver v United Kingdom (1983) 5 EHRR 347

The following additional cases were cited in argument:

Hirst v United Kingdom (No 2) (2005) 42 EHRR 849, GC
 R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46; [2003] 1 AC 837; [2002] 3 WLR 1800; [2002] 4 All ER 1089, HL(E)
 R (Chester) v Secretary of State for Justice [2010] EWCA Civ 1439; [2011] HRLR 209, CA
 R (F (A Child)) v Secretary of State for the Home Department (Lord Advocate intervening) [2010] UKSC 17; [2011] 1 AC 331; [2010] 2 WLR 992; [2010] 2 All ER 707, SC(E)
 R (Hirst) v Secretary of State for the Home Department [2002] EWHC 602 (Admin); [2002] 1 WLR 2929
 R (Wood) v Comr of Police of the Metropolis [2009] EWCA Civ 414; [2010] 1 WLR 123; [2009] 4 All ER 951, CA

APPEALS from the Divisional Court of the Queen's Bench Division

The claimants, GC and C, each appealed, with permission granted by the Supreme Court (Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Clarke of Stone-cum-Ebony JJSC) on 24 November 2010 and pursuant to certificates granted by the Divisional Court of the Queen's Bench Division (Moses LJ and Wyn Williams J) under section 12 of the Administration of Justice Act 1969 that a sufficient case had been made out for appeals direct to the Supreme Court, from the decision of the Divisional Court on 16 July 2010 [2010] HRLR 870 dismissing their claims for judicial review of decisions of the Commissioner of Police of the Metropolis not to destroy fingerprints and DNA samples which that had been taken from them in ***1233** connection with the investigation of offences for which they had not subsequently been prosecuted, or of which the second claimant had been acquitted.

The Secretary of State for the Home Department appeared as an interested party. Liberty and the Equality and Human Rights Commission intervened in the appeal, the latter by way of written submissions only.

The facts are stated in the judgment of Lord Dyson JSC.

Michael Fordham QC and Dan Squires (instructed by *Public Law Solicitors, Birmingham*) for the claimant, C.

Stephen Cragg and Azeem Suterwalla (instructed by *Fisher Meredith LLP*) for the claimant, GC.

Lord Pannick QC and Jason Beer (instructed by the *Director of Legal Services, Metropolitan Police*) for the commissioner.

James Eadie QC and Jonathan Moffett (instructed by *Treasury Solicitor*) for the Secretary of State.

Karon Monaghan QC and Helen Law (instructed by *Solicitor, Liberty*) for the first intervener.

Alex Bailin QC and Adam Sandell (instructed by *Solicitor, Equality and Human Rights Commission*) for the second intervener.

The court took time for consideration.

18 May 2011. The following judgments were handed down.

LORD DYSON JSC

Majority judgments on the appropriate relief

1 Biometric data such as DNA samples, DNA profiles and fingerprints is of enormous value in the detection of crime. It sometimes enables the police to solve crimes of considerable antiquity. There can be no doubt that a national database containing the data of the entire population would lead to the conviction of persons who would otherwise escape justice. But such a database would be controversial. It is not permitted by our law. Parliament has, however, allowed the taking and retention of data from certain persons. The questions raised by these appeals are whose data may be retained and for how long.

2 Section 64 of the Police and Criminal Evidence Act 1984 ("PACE"), as originally enacted, provided:

"(1) If— (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) he is cleared of that offence, they must be destroyed as soon as is practicable after the conclusion of the proceedings."

"(3) If— (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) that person is not suspected of having committed the offence, they must be destroyed as soon as they have fulfilled the purpose for which they were taken."

3 Section 64(1A) of PACE was inserted by section 82 of the Criminal Justice and Police Act 2001 . It is still in force. As amended by sections 117(7) and 118(4)(a) of the Serious Organised Crime and Police Act 2005 it provides: ***1234**

"Where— (a) fingerprints, impressions of footwear or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints, impressions of footwear or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came."

4 It will be seen at once that section 64(1A) does not specify any time limit for the retention of the data or any procedure to regulate its destruction. These are matters which are addressed in guidelines issued by the Association of Chief Police Officers ("the ACPO guidelines") entitled *Exceptional Case Procedure for Removal of DNA, Fingerprints and PNC Records* and published on 16 March 2006. So far as is material, these provide:

"it is important that national consistency is achieved when considering the removal of such records. Chief Officers have the discretion to authorise the deletion of any specific data entry on the [Police National Database] 'owned' by them. They are also responsible for the authorisation of the destruction of DNA and fingerprints associated with that specific entry. It is suggested that this discretion should only be exercised in exceptional cases ... Exceptional cases will by definition be rare. They might include cases where the original arrest or sampling was found to be unlawful. Additionally, where it is established beyond doubt that no offence existed, that might, having regard to all the circumstances, be viewed as an exceptional circumstance."

5 In *R (S) v Chief Constable of the South Yorkshire Police* ; *R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 ("Marper UK") the claimants sought judicial review of the retention by the police of their fingerprints and DNA samples on the grounds inter alia that it was incompatible with article 8 of the European Convention on Human Rights ("ECHR"). The majority of the House of Lords held that the retention did not constitute an

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interference with the claimants' article 8 rights, but they unanimously held that any interference was justified under article 8.2 .

6 The European Court of Human Rights ("ECtHR") disagreed: see its decision in *S and Marper v United Kingdom* (2008) 48 EHRR 1169 ("*Marper ECtHR*"). In considering whether retention of data in accordance with the ACPO guidelines was proportionate and struck a fair balance between the competing public and private interests, the court said, at para 119:

"In this respect, the court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken and retained from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or ***1235** seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."

The court concluded, at para 125:

"that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent state has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."

7 On 16 December 2008, the Secretary of the State for the Home Department announced the Government's preliminary response to the ECtHR decision. The data of children under the age of 10 would be removed from the database immediately and the Government would issue a White Paper and consult on "bringing greater flexibility and fairness into the system by stepping down some individuals over time-a differentiated approach, possibly based on age, or on risk, or on the nature of the offences involved".

8 The White Paper, *Keeping the Right People on the DNA Database* , was published on 7 May 2009. It contained a series of proposals for the retention of data, the details of which are immaterial for present purposes.

9 On 28 July 2009, ACPO's Director of Information wrote to all chief constables (including the respondent commissioner) saying that the final draft for publication of new guidelines was

not expected to take effect until 2010 and that until that time "the current retention policy on fingerprints and DNA remains unchanged".

10 On 11 November 2009, after the consultation period had ended, the Secretary of State made a written ministerial statement outlining a revised set of proposals. Again, the details are not material. It was decided to include these proposals in the Crime and Security Act 2010 which had its first reading on 19 November 2009. The 2010 Act received the Royal Assent on 8 April 2010, but the relevant provisions (sections 14, 22 and 23) have not been brought into effect. Section 23 provides that the Secretary of State must make arrangements for a National DNA Database Strategy Board ("Database Board") to oversee the operation of the National DNA Database (section 23(1)); the Database Board must issue guidance about the immediate destruction of DNA samples and DNA profiles which are or may be retained under PACE (section 23(2)); and any chief officer of a police force in England and Wales must act in accordance with any such guidance issued: section 23(3) .

11 The Coalition Government stated in the Queen's Speech on 25 May 2010 that it intended to seek amendment of the 2010 Act by bringing *1236 forward legislative proposals (in Chapter 1 of Part 1 of the Protection of Freedoms Bill) along the lines of the Scottish system. This system permits retention of data for no more than three years if the person is suspected (but not convicted) of certain sexual or violent offences, and permits an application to be made to a sheriff by a chief constable for an extension of that period (for a further period of not more than two years, although successive applications may be made): see sections 18 and 18A of the Criminal Procedure (Scotland) Act 1995 , as inserted by sections 83(2) and 104 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 .

12 GC and C issued proceedings for judicial review of the retention of their data on the grounds that, in the light of Marper ECtHR , its retention was incompatible with their article 8 rights. Recognising that there was an irreconcilable conflict between Marper UK and Marper ECtHR and that the former decision was binding on it, the Divisional Court (Moses LJ and Wyn Williams J) [2010] HRLR 870 dismissed both judicial review challenges on 16 July 2010 and in both cases granted a certificate pursuant to section 12 of the Administration of Justice Act 1969 that the cases were appropriate for a leapfrog appeal to the Supreme Court.

13 The facts of these two cases can be stated briefly. On 20 December 2007, GC was arrested on suspicion of common assault on his girlfriend. He denied the offence. A DNA sample, fingerprints and photographs were taken after his arrest. On the same day, he was released on police bail without charge. Before the return date of 21 February 2008, he was informed that no further action would be taken. On 23 March 2009, GC's solicitors requested the destruction of the DNA sample, DNA profile and fingerprints. The commissioner refused to do so on the grounds that there were no exceptional circumstances within the meaning of the ACPO guidelines.

14 On 17 March 2009, C was arrested on suspicion of rape, harassment and fraud. His fingerprints and a DNA sample were taken. He denied the allegations saying that they had been fabricated by his ex-girlfriend and members of her family. No further action was taken by the police in respect of the harassment and fraud allegations. On 18 March 2009, he was charged with rape. On 5 May 2009 at the Crown Court at Woolwich, the prosecution offered

no evidence and C was acquitted. C requested the destruction of the data and its deletion from the police database. On 12 November and again on 2 February 2010, the commissioner informed C that his case was not being treated as "exceptional" within the meaning of the ACPO guidelines and his request was refused.

The issue

15 It is common ground that, in the light of *Marper* ECtHR 48 EHRR 1169, the indefinite retention of the claimants' data is an interference with their rights to respect for private life protected by article 8 of the ECHR which, for the reasons given by the ECtHR, is not justified under article 8.2. It is agreed that *Marper* UK [2004] 1 WLR 2196 cannot stand. The issue that arises on these appeals is what remedy the court should grant in these circumstances.

16 On behalf of C, Mr Fordham QC submits that the court should grant a declaration under section 8(1) of the Human Rights Act 1998 ("HRA") *1237 that the retention of C's biometric data is unlawful. Section 8(1) provides that

"In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

He seeks no other relief.

17 On behalf of GC, Mr Cragg seeks an order quashing the ACPO guidelines and a reconsideration of the retention of GC's data within 28 days.

18 The primary submission of Lord Pannick QC (on behalf of the Commissioner of Police of the Metropolis) is that the correct remedy is to grant a declaration of incompatibility under section 4 of the HRA. The primary submission of Mr Eadie QC (on behalf of the Secretary of State) is that, although there is no fundamental objection to a declaration of incompatibility, it is not necessary to grant one.

The arguments in support of a declaration of incompatibility

19 Section 6 of the HRA provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

"(2) Subsection (1) does not apply to an act if— (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

20 In summary, Lord Pannick and Mr Eadie say that it is not possible to read or give effect to section 64(1A) of PACE in a way which is consistent with *Marper* ECtHR. They accept that section 64(1A) confers a discretionary power on the police to retain the data obtained from a

suspect in connection with the investigation of an offence. That is why they concede that section 6(2)(a) of the HRA is not in play. But they say that it is a power which, save in exceptional circumstances, *must* be exercised so as to retain the data indefinitely in all cases. Section 64(1A) cannot, therefore, be read or given effect so as to permit the power to be exercised proportionately in the way described in *Marper* ECtHR. The hands of the police are tied by section 64(1A) and that position is faithfully reflected in the ACPO guidelines.

21 Two arguments are advanced in support of this submission. The first (and principal) argument is that to interpret section 64(1A) as requiring police authorities to comply with article 8 would defeat the statutory purpose of establishing a scheme for the protection of the public interest free from the limits and protections required by article 8. It would rewrite the statutory provision in a manner inconsistent with a fundamental feature of the legislative scheme which is that, instead of being destroyed, data taken from *all* suspects shall be retained *indefinitely*. It is this feature of the scheme which leads Lord Rodger of Earlsferry JSC to invoke authorities such as *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. ***1238** Parliament intended that the discretion conferred by section 64(1A) should be exercised to promote the statutory policy and object that data taken from *all* suspects in connection with the investigation of an offence should be retained *indefinitely*. Accordingly, any exercise of the discretion conferred by section 64(1A) which does not meet this statutory policy and object would frustrate the intention of Parliament.

22 The second argument is that the nature of the changes to the ACPO guidelines that would be required in order to make them compatible with the ECHR is such that, for reasons of institutional competence and democratic accountability, these should be left to Parliament to make. The choice of compatible scheme involves a difficult and sensitive balancing of the interests of the general community against the rights of the individual and a number of different schemes would be compatible. Neither the police nor the court (in the event of a judicial review challenge to the scheme devised by the police) is equipped to make the necessary policy choices. Thus, for example, only Parliament is constitutionally and institutionally competent to decide whether to adopt the Scottish model in preference to the 2010 Act model.

Discussion

The first argument

23 This argument is based on the premise that it was the intention of Parliament that, save in exceptional cases, the data taken from *all* suspects in connection with the investigation of an offence should be retained *indefinitely*. It goes without saying that, if that premise is correct, section 64(1A) of PACE can only be interpreted as conferring a discretion which *must* be exercised so as to give effect to that intention. The conclusion necessarily follows from the premise. On that hypothesis, a purposive interpretation of the statute inevitably leads to the conclusion that the first argument is correct.

24 But I do not accept the premise. It is uncontroversial that Parliament intended (i) to abrogate section 64(1) of PACE and remove the obligation to destroy data as soon as practicable after the conclusion of the proceedings if the suspect is cleared of the offence; (ii)

to create a scheme for the retention of the data taken from a suspect, whether or not he is cleared of the offence and whether or not he is even prosecuted; and (iii) that the data was to be retained so that it might be used "for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came" (to use the language of section 64(1A)). I shall refer to these purposes as "the statutory purposes". It is also clear that, in order to promote the statutory purposes, Parliament must have intended that an extended, even a greatly extended, database should be created. But in my view that is as far as it goes. To argue from the premise that Parliament intended that a greatly extended database should be created to the conclusion that it intended that, save in exceptional circumstances, the data should be retained indefinitely in all cases is a non sequitur.

25 Parliament did not prescribe the essential elements of the scheme by which the statutory purposes were to be promoted. That task was entrusted to the police, no doubt with the assistance of the Secretary of State. If it had ***1239** been intended to require a scheme whose essential elements included an obligation that, save in exceptional circumstances, the data lawfully obtained from *all* suspects should be retained *indefinitely* , that could easily have been expressly stated in the statute. If that had been intended, surely section 64(1A) would have said in terms that, save in exceptional circumstances, the fingerprints and samples taken "shall in every case be retained indefinitely after they have fulfilled the purpose for which they were taken". This would have been the obvious way of expressing that intention. The grant of an apparently unfettered discretion (signalled by the unqualified use of the word "may") was certainly not the obvious way of expressing that intention. The natural meaning of the word "may" is permissive, not mandatory.

26 As I have said, it is clear that Parliament intended to get rid of the requirement to destroy data after it has served its immediate purpose and to permit the retention of data in order to fulfil the statutory purposes. But the statute is silent as to how the statutory purposes are to be fulfilled. There is no reason to suppose that Parliament must have intended that this should be achieved in a disproportionate way so as to be incompatible with the ECHR . Lord Rodger JSC suggests that Mr Fordham's argument entails the proposition that under section 64(1A) the police were free to do what they liked and that the subsection contains nothing to delimit the exercise of their discretion. I agree that, if this is the effect of Mr Fordham's argument, it would cast doubt as to its correctness. But section 64(1A) clearly delimits the exercise of the discretion. It must be exercised to enable the data to be used for the statutory purposes. I would add that the discretion must be exercised in a way which is proportionate and rationally connected to the achievement of these purposes. Thus, for example, the police could not exercise the power to retain the data only of those suspected of minor offences; or only of serious offences of a particular type; or only of suspects of a certain age or gender; or only for a short period. But it is possible to exercise the discretion in a rational and proportionate manner which respects and fulfils the statutory purpose and does not involve the indefinite retention of data taken from all suspects, regardless of their age and the nature of the alleged offence.

27 The commissioner and the Secretary of State assert that a fundamental feature (possibly *the* fundamental feature) of section 64(1A) is that data should be retained for use from all

suspects indefinitely. But, although expressed in different words, this is the same as the premise argument that I have already rejected. For the reasons I have given for rejecting that argument, it is not possible to extract this fundamental feature from the statute, whether one looks at its language alone or in the context of the mischief which it was intended to cure. In my view, the fundamental feature of section 64(1A) is that it gives the police the power to retain and use data from suspects for the stated statutory purposes of preventing crime, investigation of offences and the conduct of prosecutions. But that does not justify a blanket or disproportionate practice. Neither indefinite retention nor indiscriminate retention can properly be said to be fundamental features of section 64(1A) .

28 As I have said, following the judgment of the ECtHR the Secretary of State for the Home Department took steps to take the DNA of children under the age of ten off the database. If the meaning of section 64(1A) is ***1240** that, save in exceptional cases, there is a duty to retain samples taken from all suspects indefinitely, then surely this amendment to the ACPO guidelines was ultra vires section 64(1A) . That is not, however, suggested by Lord Pannick or Mr Eadie. It seems to me that, once it is accepted that section 64(1A) permits a scheme which does not insist on the indefinite retention of data in all cases, then the extreme position advocated by the commissioner and the Secretary of State cannot be maintained. So what did Parliament intend if it was not a scheme of indefinite retention in all cases? The obvious answer is a proportionate scheme which gives effect to the statutory purposes and is compatible with the ECHR . The fact that it is possible to create a number of different schemes all of which would meet these criteria does not matter. Section 64(1A) gives a power. Powers can often be lawfully exercised in different ways.

29 The commissioner and the Secretary of State seek support for the first argument from two sources. The first is the Explanatory Notes to the 2001 Act which explained at para 210:

"An additional measure has been included to allow all fingerprints and DNA samples lawfully taken from suspects during the course of an investigation to be retained and used for the purposes of prevention and detection of crime and the prosecution of offences. This arises from the decisions of the Court of Appeal (Criminal Division) in *R v Weir* and *R v B* (Attorney General's Reference No 3/199) May 2000. These raised the issue of whether the law relating to the retention and use of DNA samples on acquittal should be changed. In these two cases compelling DNA evidence that linked one suspect to a rape and the other to a murder could not be used and neither could be convicted. This was because at the time the matches were made both defendants had either been acquitted or a decision made not to proceed with the offences for which the DNA profiles were taken. Currently section 64 of PACE specifies that where a person is not prosecuted or is acquitted of the offence the sample must be destroyed and the information derived from it can not be used. The subsequent decision of the House of Lords overturned the ruling of the Court of Appeal. The House of Lords ruled that where a DNA sample fell to be destroyed but had not been, although section 64 of PACE prohibited its use in the investigation of any other offence, it did not make evidence obtained as a failure to comply with that prohibition inadmissible, but left it to the discretion of the trial judge. The Act removes the

requirement of destruction and provides that fingerprints and samples lawfully taken on suspicion of involvement in an offence or under the Terrorism Act can be used in the investigation of other offences. This new measure will bring the provisions of PACE for dealing with fingerprint and DNA evidence in line with other forms of evidence."

30 But this does not advance matters. It shows that Parliament intended to remove "the requirement of destruction" of data and that "fingerprints and samples lawfully taken on suspicion of involvement in an offence ... can be used in the investigation of other offences". But that sheds no light on whether it was intended that there should be a policy of blanket indefinite retention. The commissioner and the Secretary of State draw attention to the words "an additional measure has been included to allow *all* [data] ... to be retained" (emphasis added). But in my view this is an insufficient ***1241** foundation on which to base a conclusion that the true meaning of section 64(1A) is that, save in exceptional circumstances, biometric data must be retained indefinitely in all cases. Even if "all" means all data taken from all suspects, the Explanatory Notes do not say that data must be retained in all cases, still less do they say anything about how long the data must or may be kept. There is no indication in the notes that Parliament intended all material to be kept indefinitely even if it was not necessary to do so in an individual case within the meaning of article 8.2 of the ECHR .

31 The second source is certain passages in speeches of the House of Lords in *Marper* UK [2004] 1 WLR 2196 . The issue there was whether section 64(1A) and the ACPO guidelines were compatible with article 8 and 14 of the ECHR : see para 6 of the speech of Lord Steyn. At para 2, Lord Steyn said: "But as a matter of policy it is a high priority that police forces should expand the use of such evidence where possible and practicable." But that is a statement at a high level of generality. Lord Steyn was not purporting to define the statutory purpose with any precision.

32 At para 39 Lord Steyn addressed the submission on behalf of the claimants that the legislative aim (of assisting in the investigation of crimes in the future) could be achieved by less intrusive means. He considered the conclusion of Sedley LJ in the Court of Appeal that the degree of suspicion should be considered in individual cases before a decision was made whether or not to retain the data. He rejected this suggestion saying:

"this would not confer the benefits of a greatly expanded database and would involve the police in interminable and invidious disputes (subject to judicial review of individual decisions) about offences of which the individual had been acquitted."

I have already accepted that Parliament intended that the exercise of the section 64(1A) power should lead to a "greatly expanded database" and that Lord Steyn was rejecting the idea that the scheme contemplated by section 64(1A) should involve assessment of the degree of suspicion on a case by case basis. But he was not saying that, subject to exceptional circumstances, section 64(1A) required the introduction of a scheme under which the data taken from all suspects would be retained indefinitely, since any other interpretation would undermine the statutory purpose.

33 At para 78, Baroness Hale of Richmond said that the whole community (as well as the individuals whose samples are collected)

"benefits from there being as large a database as it is possible to have. The present system is designed to allow the collection of as many samples as possible and to retain as much as possible of what it has."

That is undoubtedly true. But the "system" included the ACPO guidelines. It was, therefore, not contentious that the "system" was designed to catch and retain as many samples as possible. Moreover, leaving ECHR issues aside, section 64(1A) does *allow* the collection and retention of as many samples as possible. Baroness Hale was not, however, saying that section 64(1A) *required* the collection and retention of as many samples as possible. Similarly, at para 88 Lord Brown of Eaton-under-Heywood said that the benefits of the "larger database brought about by the now impugned amendment to PACE " were manifest. The more complete the database, the better the chance of detecting criminals and of deterring future crime. *1242 But here too, Lord Brown was not considering the question whether section 64(1A) conferred a power which, save in exceptional circumstances, could only be exercised by requiring the retention of the data taken from all suspects indefinitely. The question whether, leaving ECHR issues aside, section 64(1A) required the retention of the data taken from all suspects indefinitely was not in issue in *Marper UK* .

34 The focus of the argument in *Marper UK* was on whether section 64(1A) and the ACPO guidelines were compatible with the ECHR . In particular, it was on whether article 8.1 was engaged and whether the ACPO scheme was justified under article 8.2 . The context of the observations relied on to support the first argument was the practice of the police, save in exceptional cases, to retain all data indefinitely. There was no debate on whether, if article 8.1 was engaged and the ACPO guidelines could not be justified under article 8.2 , section 64 (1A) could be read and given effect in a way compatible with the ECHR . So I reject the submission that *Marper UK* provides support for the submission that underpins the first argument, namely that it was the intention of Parliament that, save in exceptional cases, the data of *all* suspects should be retained *indefinitely* .

35 In my view, section 64(1A) permits a policy which (i) is less far reaching than the ACPO guidelines; (ii) is compatible with article 8 of the ECHR ; and (iii) nevertheless, promotes the statutory purposes. Those purposes can be achieved by a proportionate scheme. It is possible to read and give effect to section 64(1A) in a way which is compatible with the ECHR and section 6(2)(b) of the HRA cannot be invoked to defeat the claim that the ACPO guidelines are unlawful by reason of section 6(1) of the HRA . For the reasons that I have given, to interpret section 64(1A) compatibly with article 8 does not impermissibly cross the line where, to use the words of Lord Bingham of Cornhill in *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 , para 28, it

"would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation."

36 This conclusion is consistent with the decision in *R (L) v Comr of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2010] 1 AC 410 . The claimant was employed by an agency providing staff for schools. The agency required her to apply under section 115(1) of the Police Act 1997 for an enhanced criminal record certificate giving the prescribed details of every relevant matter relating to her which was recorded in central records, since she was a prospective employee who was being considered for a position involving regularly being involved with persons under the age of 18. Section 115(7) provided that, before issuing a certificate, the Secretary of State shall request the chief police officer of every relevant police force “to provide any information which, in the chief officer’s opinion— (a) might be relevant for the purpose described in the statement under subsection (2) , and (b) ought to be included in the certificate”. The Commissioner of Police of the Metropolis disclosed certain information about the claimant which was included in the certificate. ***1243** She sought judicial review of the decision to disclose the information on the ground that her article 8 rights had been violated.

37 On behalf of the Secretary of State, it was submitted that the words “any information” and “ought to be included” in section 115(7) showed that Parliament intended widespread disclosure of relevant material and a narrow exception. This interpretation was supported by the protective purpose of the legislation: see p 416 G . That was the practice under the relevant police guidelines.

38 It is true that there was no issue in that case about section 6(2) of the HRA . That is why the analogy cannot be pressed too far. But in essence it was being argued in the context of article 8.2 of the ECHR that it was a fundamental feature of the Police Act 1997 that all relevant information could (and should) be disclosed in a criminal record certificate, since anything less would defeat the fundamental protective purpose of the statute. These submissions are similar to those advanced in the present case. But they were rejected. Despite the protective purpose of the legislation and the use of the word “any”, at para 44, Lord Hope of Craighead DPSC said that the words “ought to be included” should be read and given effect in a way that was compatible with the applicant’s article 8 rights. At para 81, Lord Neuberger of Abbotsbury MR adopted a broad interpretation of section 115(7)(b) and said that, in deciding whether the information ought to be included, there would be a number of different, sometimes competing, factors to weigh up.

39 For all these reasons, I would reject the first argument advanced on behalf of the commissioner and the Secretary of State.

The second argument

40 The second argument is that Parliament could not have intended to entrust the creation of a detailed scheme pursuant to section 64(1A) to the police (with or without the assistance of the Secretary of State) subject only to the judicial review jurisdiction of the court. It is said that the creation of guidelines for the exercise of the section 64(1A) power is a matter for Parliament alone and that it could not have been intended that section 64(1A) should grant a broad discretion to the police such as is contended for by Mr Fordham. This is because the context involves high policy, balancing the public interest in the effective detection, prosecution and prevention of crime against individual freedoms. It is a matter of political

controversy, as evidenced by the different policy solutions of the previous and present Government. There are choices to be made between a variety of compatible legislative schemes. These choices are for Parliament alone. The police are in no position, constitutionally or institutionally, to choose between them.

41 It is important to note the scope of this argument. It is not that Parliament could not have granted the police a discretionary power to retain data otherwise than on a blanket indefinite basis. If it had wished to grant such a power to the police, Parliament obviously could have done so. Rather, the argument is that the constitutional and institutional limits on the competence of the police are such that Parliament could not have intended to grant such a power to them.

42 I cannot accept this argument. No question of constitutional competence arises here. Parliament is entitled to give the police the power to create a scheme. No doubt it would have envisaged that a national scheme ***1244** would be produced such as the ACPO guidelines. The Secretary of State is accountable to Parliament for the scheme so that the democratic principle is preserved.

43 There are circumstances in which institutional competence is a factor in the court's deciding the extent to which it should pay "deference" to a decision of the executive and allow a discretionary area of judgment. But we are not concerned with the court's judicial review jurisdiction in the present context. We are concerned with a question of statutory interpretation. There is no reason in principle why the police (together with the Secretary of State) should be less well equipped than Parliament to create guidelines for the exercise of the section 64(1A) power. In creating a proportionate scheme, they have to strike a balance. That is inherent in any exercise of this kind, whether it is performed by the executive or Parliament. The police guidelines that were in play in *R (L) v Comr of Police of the Metropolis* were not the product of work by Parliament. Policy and guidance documents of this kind, often in areas of acute sensitivity, are frequently created by the executive. Provided that they fulfil the purposes of the enabling statute, they are valid and enforceable.

44 In my view, the fact that difficult decisions would have to be made in producing guidelines for the exercise of the section 64(1A) power is not a sufficient reason for concluding that Parliament could not have intended to give the power to produce them to the police and the Secretary of State.

What relief, if any, should be granted?

The biometric data

45 In deciding what relief to grant, it is important to have regard to the present state of play. As previously stated, Chapter 1 of Part 1 of the Protection of Freedoms Bill includes proposals along the lines of the Scottish model. The history of the varying responses to Marper ECtHR 48 EHRR 1169 shows that it is not certain that it will be enacted. But we were told by Mr Eadie that it is the present intention of the Government to bring the legislation into force later this year. In shaping the appropriate relief in the present case, I consider that it is right to proceed on the basis that this is likely to happen, although not certain to do so.

46 In these circumstances, in my view it is appropriate to grant a declaration that the present ACPO guidelines (amended as they have been to exclude children under the age of 10), are unlawful because, as clearly demonstrated by *Marper* ECtHR, they are incompatible with the ECHR. It is important that, in such an important and sensitive area as the retention of biometric data by the police, the court reflects its decision by making a formal order to declare what it considers to be the true legal position. But it is not necessary to go further. Section 8(1) of the HRA gives the court a wide discretion to grant such relief or remedy within its powers as it considers just and appropriate. Since Parliament is already seised of the matter, it is neither just nor appropriate to make an order requiring a change in the legislative scheme within a specific period.

47 The ECtHR has recently decided that, where one of its judgments raises issues of general public importance and sensitivity, in respect of which the national authorities enjoy a discretionary area of judgment, it may be appropriate to leave the national legislature a reasonable period of time to ***1245** address those issues: see *Greens and MT v United Kingdom* (Application Nos 60041/08 and 60054/08) (unreported) given 23 November 2010, paras 113–115. This is an obviously sensible approach. The legislature must be allowed a reasonable time in which to produce a lawful solution to a difficult problem.

48 Nor would it be just or appropriate to make an order for the destruction of data which it is possible (to put it no higher) it will be lawful to retain under the scheme which Parliament produces.

49 In these circumstances, the only order that should be made is to grant a declaration that the present ACPO guidelines (as amended) are unlawful. If Parliament does not produce revised guidelines within a reasonable time, then the claimants will be able to seek judicial review of the continuing retention of their data under the unlawful ACPO guidelines and their claims will be likely to succeed.

The photographs of GC

50 Mr Cragg raises a discrete issue about the photographs that were taken of GC when he was arrested. Section 64A of PACE confers a power to take, use and retain photographs of arrested persons who are not subsequently convicted of the offence for which they were arrested. In the application for judicial review, the issue of whether the retention of the photographs violated GC's article 8 rights was mentioned in what Moses LJ described, at para 40, as "a passing reference in the claim form and in paragraph 20 of the grounds". At para 43, Moses LJ said: "the issues of justification for their retention cannot now properly be considered where the commissioner has had no opportunity to give evidence as to justification."

51 Lord Pannick submits that, in view of the manner in which the issue was raised in the Divisional Court, the consequent absence of any evidence as to justification and the absence of any substantive judgment on the issue from the Divisional Court, the Supreme Court should express no opinion on this part of the appeal, but leave the matter to be determined if and when the point is properly raised in another case. I accept these submissions. I should also mention that Mr Fordham raises a discrete point about information held on the Police

National Computer about C. This was the subject of two agreed issues which were dealt with by the Divisional Court at paras 24–26 and 46–47 of the judgment of Moses LJ. It is common ground that the retention of this information raises no separate issues from those raised by the retention of C's DNA material and his fingerprints.

Conclusion

52 For the reasons that I have given, I would allow the appeals and grant a declaration that the present ACPO guidelines are unlawful because they are incompatible with article 8 of the ECHR . I would grant no other relief.

LORD PHILLIPS OF WORTH MATRAVERS PSC

53 I agree with the judgment of Lord Dyson JSC. I have, however, a little that I would add to his reasoning.

54 Section 3 of the Human Rights Act 1998 ("the HRA") requires this court, in so far as it is possible to do so, to interpret legislation in a way ***1246** which is compatible with Convention rights. Sometimes this results in the court according to a statutory provision a meaning that conflicts with the natural meaning of a statutory provision: see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 . In summarising the effect of that decision in *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 , para 28 Lord Bingham of Cornhill stated that the interpretative obligation under section 3 was very strong and far reaching and might require the court to depart from the legislative intention of Parliament.

55 This is not a case where the HRA requires the court to accord to a statutory provision a meaning which it does not naturally bear. There is no difficulty in giving section 64(1A) of PACE , set out in para 3 of Lord Dyson JSC's judgment (" section 64(1A) "), an interpretation which is compatible with article 8 of the Convention, as interpreted by the European Court of Human Rights in *S and Marper v United Kingdom* 48 EHRR 1169 . The section gives a discretionary power to the police to retain samples taken from a person in connection with the investigation of an offence. Section 3 of the HRA imposes a duty on the police, as a public authority, in so far as it is possible to do so, to give effect to the power conferred on them in a way which is compatible with Convention rights. There is nothing in the wording of section 64(1A) , giving it its natural meaning, which either requires or permits the police to exercise the power conferred on them in a manner which is incompatible with article 8 .

56 In order to hold that section 64(1A) is incompatible with the Convention it is thus necessary to identify some matter, extrinsic to the wording of the section itself, that compels one to interpret the section as either requiring or permitting the police to exercise the power conferred on them in a manner incompatible with article 8 . Such a matter needs to be extraordinarily cogent in order to overcome the effect of section 3 of the HRA . I have not been able to identify any such matter.

57 In *R (S) v Chief Constable of the South Yorkshire Police ; R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 the House of Lords held, wrongly as the European Court of Human Rights was to rule, that in so far as section 64(1A) interfered with article 8 rights the interference was justified under article 8.2 . In so far as Parliament

considered the matter when enacting section 64(1A) it is likely to have taken the same view. Parliament may well have considered that the Convention did not require any restriction to be placed on the exercise of the power conferred by section 64(1A). It does not follow, however, that Parliament must be presumed to have intended that, if the Convention did require the power to be exercised subject to constraints, the police should none the less be required, or permitted, to disregard those constraints.

58 The effect of section 64(1A) was to reverse the requirement of the previous section 64 of PACE that fingerprints and samples should be destroyed when a suspect was cleared of an offence. The purpose of this reversal was plainly that the police should be permitted to establish a database of such material obtained from those suspected of criminal activity. I see no basis for concluding, however, that Parliament intended that the establishment and maintenance of this database should be untrammelled by any requirements that might be imposed by the Convention. While those requirements limit the circumstances in which material can be retained by ***1247** application of the familiar test of proportionality, they do not prohibit the maintenance of a database that satisfies that test.

59 Had Parliament foreseen that the Convention required restrictions on the power conferred by section 64(1A) the likelihood is that Parliament, guided by the executive, would itself have wished to define those restrictions rather than leaving them to be determined by executive action. That can be deduced from the fact that Parliament's reaction to the European court's ruling in *S and Marper v United Kingdom* 48 EHRR 1169 was to pass amending legislation and that the present Government intends to introduce an amending Bill. I do not consider, however, that it follows from this that one must interpret section 64(1A) as requiring the police to exercise the power conferred by that section in a manner which infringes the requirements of the Convention, or even as permitting the police to disregard those requirements.

60 For these additional reasons I can see no warrant for making a declaration of incompatibility, convenient though this might be, and concur in the order proposed by Lord Dyson JSC.

BARONESS HALE OF RICHMOND JSC

61 Whether and in what circumstances the police should be able to keep the DNA samples and profiles, fingerprints and photographs of people who have been arrested but not convicted is a deeply controversial question. The Government is promoting the Protection of Freedoms Bill which will adopt in England and Wales the present system in Scotland. This allows retention only for a limited period and in respect of certain crimes. It reflects a strong popular sentiment that the police should not be keeping such sensitive material relating to "innocent" people, even if they are only allowed to use it "for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution": Police and Criminal Evidence Act 1984, section 64(1A), as inserted by the Criminal Justice and Police Act 2001, section 82. If the popular press is any guide to public opinion, the decision of the European Court of Human Rights in *S and Marper v United Kingdom* 48 EHRR 1169 is one which captures the public mood in Britain much more successfully than many of its other decisions.

62 Among the arguments marshalled against retaining the data are these: (a) The agencies of the state cannot be trusted to use such information only for the permitted purposes, nor can the state be trusted not to enlarge those purposes in future. DNA samples, in particular, might be put to many more controversial uses should the state feel so inclined. (b) Serious bodies have cast doubt upon the usefulness of retaining it even for the permitted purposes. Both the Human Genetics Commission (*Nothing to hide, nothing to fear? Balancing individual rights and the public interest in the governance and use of the national DNA Database* , November 2009) and the Nuffield Council on Bioethics (*The forensic use of bioinformation: ethical issues* , September 2007) suggest that the value of casting the net so wide has not yet been proved. (c) The Equality and Human Rights Commission argue, in their intervention in this case, that the premise on which such data are kept, that people who are arrested are more likely than the general population to be involved in future offending, is "unsustainable". (d) Liberty point out, in their intervention, that certain sections of the population, in particular men and people from the black and minority ethnic communities, run a ***1248** disproportionate risk of arrest and therefore of having their data taken and kept. This is a detriment with a discriminatory impact. (e) The detriment is the stigma, certainly felt and possibly perceived by others, involved in having one's data on the database. This stigma, together with wider concerns about potential misuse, is sufficient to outweigh the benefits in the detection and prosecution of crime.

63 Among the arguments marshalled in favour of retaining the data are these: (a) Those of a more trusting nature find it difficult to imagine that there is a serious risk that the agencies of the state will indeed misuse this information for more sinister purposes. The risk would in any event be much reduced if DNA samples were destroyed and only profiles, fingerprints and photographs retained. (b) As to their usefulness, the Chief Constable of the West Midlands gave evidence on 22 March 2011 to the House of Commons Public Bill Committee hearing on the Protection of Freedoms Bill that between 2 and 3 per cent of the 36,000 "hits" on the database would be lost if the proposals in the Bill became law. These may only be a small proportion of the total, but among the 1,000 or so crimes which would not be solved some would be very serious. (c) It is not clear that the underlying premise is indeed that people who have been arrested but not charged or convicted are more likely than the general population to commit crimes. After all, the Act also allows the police to keep data they have collected from people who have never been arrested, provided that they consent. The reality is that arrest gives the police the opportunity compulsorily to collect the data: it is not the reason why they do so. (d) The discriminatory impact of disproportionate arrest rates among male and black and minority ethnic members of the population could as logically be addressed by compiling a national database of everyone, rather than by restricting it to people involved in the criminal justice system. There is now a proliferation of national databases holding data on large sections of the population which data can be put to far more detrimental uses than this. (e) Any stigma felt or perceived is irrational, at least if the information is used for its permitted purposes. A person who might otherwise have been among "the usual suspects" arrested for a crime may be eliminated before he even gets to the police station. A person who is rightly arrested, prosecuted and convicted because a match is found does not deserve our sympathy. We should be concentrating on the quality of the scientific evidence as to sampling and matching rather than on the feelings of those

whose samples have been kept. The feelings of the victims of crime are at least as important as the feelings of the criminals. They too have a human right to have their physical and mental integrity protected by the law, and it is in this context that DNA evidence, in particular, has proved most useful.

64 We are not called upon to resolve that debate in this case. It is common ground that the decision of the House of Lords in *R (S) v Chief Constable of the South Yorkshire Police ; R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 ("Marper UK") cannot stand in the light of the decision of the European Court of Human Rights in *S and Marper v United Kingdom* 48 EHRR 1169 . The only question is what we should do about it in this case. This is, as I understand it, a question governed by legal principle and the Human Rights Act 1998 and not by our particular preferences for how the United Kingdom should solve the problem. There are three broad options open to the court. (i) We could ***1249** decide, in the light of the individual facts of the cases before us, whether the retention of data in each case is compatible with the claimant's Convention rights. If it is not, we could make declarations to that effect and even mandatory orders for the deletion and destruction of the data involved. (ii) We could declare that the current ACPO guidelines, approved in *Marper UK* , are unlawful, without determining what would be lawful in the cases before us. (iii) We could declare that section 64(1A) of PACE is incompatible with the Convention rights, thus leaving the current guidelines in place and everything done under them lawful until Parliament enacts a replacement either by primary legislation or under the "fast track" remedial procedure laid down in section 10 of the Human Rights Act 1998 .

65 The choice between (i) or (ii), on the one hand, and (iii), on the other hand, depends upon the "difficult and important" question (see Lord Mance in *Doherty v Birmingham City Council* (Secretary of State for Communities and Local Government intervening) [2009] AC 367 , para 141) of the meaning and scope of section 6(2)(b) of the Human Rights Act 1998 . This, rather than the policy debate outlined above, is the important issue in this case. If it is resolved in favour of (i) or (ii) and against (iii), then the choice between (i) and (ii) depends upon what the court considers a "just and appropriate" remedy under section 8(1) of the 1998 Act. I should say at once that on both issues I agree with the conclusions reached by Lord Dyson JSC.

66 Under section 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. But the sovereignty of Parliament requires that exceptions be made for certain things which are done pursuant to an Act of the United Kingdom Parliament. As the annotations to the Act (by Peter Duffy QC and Paul Stanley) in *Current Law Statutes* explain, the exceptions

"are all designed to prevent section 6 being used to circumvent the general principle of the Act embodied in sections 3(2)(b) and 4(6)(a), that incompatible primary legislation shall remain fully effective unless and until repealed or modified."

In that event, the most that the court can do is make a declaration under section 4(2) that the Act is incompatible and leave it to Parliament to decide what, if anything, to do about it. It follows, however, that the exceptions must be read along with section 3(1) . Section 3(1)

requires that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". This obligation is laid upon everyone, not just upon the courts.

67 Two exceptions to the general rule in section 6(1) are provided by section 6(2). Section 6(2)(a) has presented little difficulty: it provides that subsection (1) does not apply if "as the result of one or more provisions of primary legislation, the authority could not have acted differently". This covers situations where the public authority was required by an incompatible Act of Parliament to do as it did (or perhaps where it had a choice between various courses of action, each of which was incompatible with the Convention rights). Although section 6(2)(a) does not say so, it must be read subject to section 3(1). So both the public authority and the courts, in deciding whether or not the authority could have acted differently, will have first to decide whether the Act of Parliament can be read or given effect in a way which is compatible rather than incompatible with the ***1250** Convention rights. If the Act can be read compatibly, then it follows that the authority could have acted differently and will have no defence if it has acted incompatibly.

68 Section 6(2)(b) makes the link with section 3(1) explicit, but has caused much more difficulty in practice. It provides that section 6(1) does not apply to an act (or failure to act) if

"in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

So the first question is always whether the primary legislation can be read or given effect in a compatible way. If it can, that is an end of the matter: see *Manchester City Council v Pinnock* (Secretary of State for Communities and Local Government intervening) [2010] 3 WLR 1441, paras 93–103. In that case, both the provision requiring the court to make a possession order in respect of a demoted tenancy and the provision empowering the local authority to seek one could be read and given effect in a compatible way. This bears out the prediction by Beatson and others, in *Human Rights: Judicial Protection in the United Kingdom* (2008), para 6–23, that cases where legislation cannot be read down under section 3 "are likely to be rare". However, if the legislation cannot be so read or given effect, the second question is whether the public authority was acting so as to give effect to or enforce it. As to this, it is possible to detect some differences of opinion among the judges. Some have taken the view that the fact that there may be choices involved in whether or not to give effect to or enforce the incompatible provision makes no difference: the authority was acting so as to give effect to or enforce it. Others, most notably Lord Mance in the *Doherty* case [2009] AC 367, would draw a distinction between the court, which might have no choice but to give effect to an incompatible provision, and the public authority bringing the proceedings, which could choose whether or not to do so and should be guided by Convention values when making its decisions.

69 Fortunately, we do not have to resolve that debate. This case is about the first question: can section 64(1A) be read and given effect compatibly with the Convention rights? In my view it clearly can. This is for two principal reasons. The first relates to the requirement to

"read"—that is, interpret-statutory language compatibly with the Convention rights. In this case, to say that section 64(1A) cannot be so read involves reading "may be retained" as "must be retained, save in exceptional circumstances". This would be doing the reverse of what section 3(1) requires. In other words, it would be reading into words which *can* be read compatibly with the Convention rights a meaning which is incompatible with those rights. It would be giving the broad discretion provided in section 64(1A) an unnatural or strained meaning to require it to be given effect in an incompatible way.

70 That view is reinforced by the fact that it was the clear intention of Parliament to legislate compatibly rather than incompatibly with the Convention rights. Section 64(1A) was introduced into PACE by section 82 of the Criminal Justice and Police Act 2001. When the Bill which became that Act was introduced into Parliament, it was prefaced by the ministerial statement required by section 19(1)(a) of the Human Rights Act 1998. *1251 The Home Secretary, Mr Straw, stated that "In my view the provisions of the Criminal Justice and Police Bill are compatible with the Convention rights". He was not alone in that view. After all, the House of Lords in *Marper UK* [2004] 1 WLR 2196 unanimously took the view that section 64(1A) was compatible with the Convention rights. But this does not suggest to me that Parliament's intention was that the apparent discretion which it conferred should inevitably be read incompatibly with the Convention rights should that view later prove to be unfounded. Quite the reverse.

71 The second relates to the requirement in section 3(1) that legislation be "given effect" compatibly with the Convention rights. As Lord Rodger of Earlsferry emphasised in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 107, section 3(1) contains not one, but two, obligations. In retrospect, that is what the Court of Appeal had in mind in the case which became *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291: that the court's power to make a care order giving the local authority enhanced (that is, determinative) parental responsibility for a child should be given effect in such a way as to prevent the local authority exercising that responsibility incompatibly with the Convention rights of either the child or his parents. Also in retrospect, one can see that the proper remedy for incompatible actions by the local authority is a freestanding action under section 7(1)(a) of the Human Rights Act 1998, rather than by the care court adopting powers which contradicted the "cardinal principle" of the separation of powers between court and local authority in care proceedings.

72 *In re S* is the strongest case in favour of the position adopted by the commissioner and the Secretary of State in this case. They have to argue that, despite ostensibly giving the police a discretion, the "cardinal principle" was, not that data may be kept, but that they must be kept. The ACPO guidelines could say only one thing. Further, they must argue that that principle is so fundamental to the legislative purpose that only Parliament can modify it if it turns out that those guidelines are incompatible with the Convention rights. I can readily accept that it may be desirable for Parliament rather than ACPO to put something in its place. But I cannot see how it was possible for the discretion conferred by section 64(1A) to be exercised in accordance with ACPO guidelines when it was first enacted but it is not possible for it to be so exercised now. In other words, if it was possible to read and give effect to section 64(1A) by means of ACPO guidelines when it was first enacted, it must be possible to

do so now. And ACPO as a public authority has to act compatibly with the Convention rights. For these reasons, therefore, section 64(1A) is not incompatible with the Convention rights and cannot be so declared.

73 However, the need for a consistent national approach must be relevant to the choice between remedy (i) and remedy (ii). The court is empowered by section 8(1) to grant such relief or remedy in relation to an unlawful act "as it considers just and appropriate". There would be nothing to stop ACPO promulgating some new and Convention-compliant guidelines. Now that *Marper UK* [2004] 1 WLR 2196 has been overruled, they clearly should set about doing so unless Parliament does it for them within a reasonably short time. But I certainly accept that the system will not work if different police forces adopt different policies. So it would not be "appropriate" (such a flexible word) for this court to make mandatory decisions in individual cases unless and until it becomes clear that neither ***1252** ACPO nor Parliament is prepared to make the difficult choices involved. I therefore agree that we should declare the current guidelines unlawful but grant no further relief.

LORD JUDGE CJ

74 I agree with the reasoning and conclusions of the majority of the members of the court. In deference to the contrary views I shall add some brief words of my own.

75 The insertion of section 64(1A) in the Police and Criminal Evidence Act 1984 by section 82 of the Criminal Justice and Police Act 2001 resulted in the promulgation of the *Retention Guidelines for Nominal Records on the Police National Computer* (the ACPO guidelines) 2006. Thereafter in England and Wales the retention of biometric data (DNA samples) was governed by these guidelines which derived their authority from section 64(1A) .

76 The judicial examination of these provisions in England and Wales culminated in a decision of the House of Lords in *R (S) v Chief Constable of the South Yorkshire Police ; R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 that the retention of DNA samples did not constitute an interference with the rights granted by article 8 of the European Convention of Human Rights , or if it did, that the interference was modest and proportionate.

77 The Grand Chamber of the European Court of Human Rights disagreed, and concluded that the system created by the ACPO guidelines constituted an interference with article 8 rights: *S v United Kingdom* 48 EHRR 1169 . Taking account of the decision and applying its reasoning we are all agreed that the decision of the House of Lords should no longer be treated as authoritative. Therefore these appeals must be allowed.

78 The forensic battle is directed at the consequences which should now flow.

79 The starting point is the reasoning of the Grand Chamber which identified the way in which different member states addressed the retention issue, and acknowledged that even following acquittal, it was permissible, subject to specific limitations within the domestic arrangements, for DNA samples to be retained. What however was required of any arrangements for retention was an approach which discriminated "between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious

cases". Attention was drawn to the position in Scotland where the legislative arrangements permitted the retention of the DNA of unconvicted individuals, limited in the case of adults to those "charged with violent or sexual offences and even then, for three years only", with the possibility of an extension for a further two years with judicial agreement. These arrangements were not criticised. Indeed the court acknowledged that the retention of DNA profiles represented the legitimate purpose "of assisting in the identification of future offenders". In short the existence of the legislative provisions for the retention of DNA samples was endorsed, but criticism was directed at the "blanket and indiscriminate nature of the power of retention" found in the ACPO guidelines.

80 Accordingly nothing in the judgment of the court leads to the conclusion that a different, less all encompassing scheme deriving its authority from section 64(1A) would contravene article 8 , or that the law in ***1253** relation to DNA samples should revert to the former wide-ranging prohibition against the retention of samples of any kind which was the striking feature of section 64 of the 1984 Act as originally enacted. Rather the judgement confirmed that legislative arrangements may provide for the retention of the DNA samples of those acquitted of criminal offences. That is what section 64(1A) , reversing the provisions of section 64 , permits.

81 In these circumstances it was open to ACPO to reconsider and amend the guidelines (as indeed, at least in part, it did) in the light of the decision of the European court, and it would be open to ACPO to do so in the light of the decision of this court. Section 64(1A) does not preclude an amendment to the guidelines which addresses the criticisms. In other words, although the process of further amendment to the arrangements for the retention of DNA samples in England and Wales has been and continues to be addressed through legislation, this was not and is not the only way to provide for the protection of article 8 rights against the current scheme for their indiscriminate retention. In my judgment section 64(1A) is Convention compliant, whereas the ACPO guidelines in their present form are not. Accordingly, the retention of the DNA samples of these claimants was unlawful, but a declaration of incompatibility would be inappropriate.

LORD KERR OF TONAGHMORE JSC

82 Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood JJSC in powerfully reasoned judgments, which I initially found persuasive, have concluded that section 64(1A) of the Police and Criminal Evidence Act 1984 (PACE) had as its purpose the institution of a scheme for the indefinite retention of biometric data taken from all suspects (with very limited exceptions) in connection with the investigation of offences. On that account they found that, despite the seemingly permissive language of the subsection, the Association of Chief Police Officers (ACPO), to whom the task of drawing up guidelines for the implementation of section 64(1A) had been entrusted, were obliged to ensure that, instead of being destroyed as previously required by section 64(1) of PACE , samples taken from suspects would be retained indefinitely and so remain available to the police on the national DNA database.

83 If indefinite retention of data was indeed section 64(1A) 's unmistakable purpose, I would have readily agreed that the discretion that "samples *may* be retained after they have

fulfilled the purposes for which they were taken" would have to be exercised so as to give effect to that intention. That, as Lord Rodger JSC has said, would be the inevitable consequence of the application of the principle for which *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 is the seminal authority: that a discretion conferred with the intention that it should be used to promote the policy and objects of the Act can only be validly exercised in a manner that will advance that policy and those objects. More pertinently, the discretion may not be exercised in a way that would frustrate the legislation's objectives. Everything therefore depends on what one decides is the true intention or purpose of the legislation.

84 This is not as easy a question to answer as the simple formulation, "what was the purpose of the legislation", suggests. As Lord Brown JSC has pointed out in para 145 of his judgment, the search for the purpose of a particular item of legislation may have to follow a number of avenues and ***1254** may require consideration of several aspects of the enactment-what is the grain of the legislation, what its underlying thrust etc. An important factor in the conclusion on this critical question which Lord Rodger JSC has identified is the fact that Parliament clearly saw the need for retreat from the position that had hitherto obtained under section 64(1) (3) of PACE as originally enacted. Those subsections were in these terms:

"(1) If— (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) he is cleared of that offence, they must be destroyed as soon as is practicable after the conclusion of the proceedings."

"(3) If— (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) that person is not suspected of having committed the offence, they must be destroyed as soon as they have fulfilled the purpose for which they were taken."

85 As Lord Rodger JSC has pointed out, the decision of the House of Lords in *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91 brought to the attention of the public and Parliament the effect of these provisions. Potentially useful evidence was not being used for reasons that, as Lord Steyn put it, were "contrary to good sense": see p 118. No doubt reaction to the experience in that case contributed to Parliament's decision to enact section 64(1A) but did it, as Lord Rodger JSC has concluded, lead to Parliament's resolve that samples taken from suspects would be retained indefinitely and so remain available to the police on the national DNA database? In my judgment, and largely for the reasons given by Lord Dyson JSC, it did not.

86 In the first place, if that was Parliament's intention it chose a curious way to achieve it. A simple, unambiguous provision to that effect would not have been difficult to devise. And if the purpose of the legislation was to obtain a blanket, universally applied (apart from exceptional cases) policy, why would Parliament have left the practicalities of implementing the policy to ACPO? The drafting of the provision at a level of generality surely suggests that Parliament intended a measure of flexibility to be a feature of its application. This is unsurprising. The history of evolving knowledge as to the use to which DNA evidence could be put provided the clearest possible reasons not to adopt over prescriptive rules that might

impede its full exploitation in circumstances unforeseen at the time of their enactment. Just as it was judged, in retrospect, to be unwise to have an immutable requirement to destroy all samples from certain categories of suspects and defendants, so also it would be unwise to substitute that obligation with a blanket requirement to retain all samples.

87 Various members of the Appellate Committee of the House of Lords in *R (S) v Chief Constable of the South Yorkshire Police ; R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 described the benefits that can flow from the maintenance of an expanded database for DNA samples and I am in respectful agreement with all that Lord Steyn, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood had to say on this subject in that case. But I do not consider that it necessarily follows that an inflexible policy requiring retention of virtually every sample taken from suspects and defendants is needed in order to have a viable and worthwhile resource.

***1255**

88 Whatever view one takes of the competing policy arguments on this issue, however, it is, to my mind, quite clear that Parliament did not intend that this was the only way in which the legislation could be implemented. Not only does section 64(1A) use the permissive "may" in relation to the retention of samples but subsection (3) is retained in its original state, albeit that it may now be disapplied in a variety of circumstances outlined in section 64(3AA) to (3AD) (as inserted by section 82(4) of the Criminal Justice and Police Act 2001). This seems to me clearly to indicate recognition that there should be limits on the retention of samples but, not surprisingly, Parliament did not attempt to forecast comprehensively what those limits should be. The structure of the new section 64 is strongly suggestive of an intention to devise a scheme that would respond to developments in this field, not least any view that might be taken as to the human rights implications that might come to be recognised. As Lord Dyson JSC has put it, Parliament's intention must be taken to have been to create a proportionate scheme which is compatible with the Convention. There is nothing to impel the conclusion that Parliament intended that the scheme could not adapt to whatever the compatibility requirements were found to be. On the contrary, there is every reason to suppose that Parliament intended that the scheme could be adapted to meet those requirements as and when they became apparent.

89 What the commissioner and the Secretary of State's argument resolves to is that, in interpreting section 64 , we should recognise that an underlying, not expressly articulated, purpose was that the samples *had to be* retained indefinitely, regardless of the circumstances in which they were taken or of the circumstances of the individual from whom they had been taken. There is nothing in the language of the section itself that compels such an exclusive interpretation. Indeed, as Lord Phillips of Worth Matravers PSC has pointed out, acceptance of this argument would involve reading more into section 64(1A) than its ordinary language conveys.

90 ACPO's guidelines were an essential complement to the statutory scheme. Those guidelines have been altered (in relation to children under 10) as a result of the decision of the Grand Chamber in *S and Marper v United Kingdom* 48 EHRR 1169 . There is no lawful impediment to ACPO devising and implementing guidelines that take full account of the other

features which the Grand Chamber has decreed are necessary for the operation of the scheme to be Convention compliant. Classifications (as to which categories of offences or individuals should require retention of samples) and long stop provisions (as to the period that they should be retained) are well within the institutional reach of ACPO. So also are the circumstances in which exceptions to the guidelines can be permitted. ACPO chose the exceptionality criteria. They may equally change those criteria. And because there is no legal impediment in them doing so, then under section 6 of HRA, they or Parliament must. Section 6(2)(b) can only come into play if ACPO cannot act. If it can, then it must.

91 Because parliamentary change is imminent, however, and because significant policy issues need to be considered, it is not unreasonable to leave this to Parliament. I therefore agree with the order proposed by Lord Dyson JSC.

92 I also agree with all that Lord Dyson JSC has had to say on the argument that Parliament could not have intended to entrust the creation of a detailed scheme pursuant to section 64 (1A) to the police subject only to the ***1256** judicial review jurisdiction of the court. As he has said, the scope of the argument is confined. It is to the effect that, although it could have done so if it had considered it appropriate, Parliament must be taken not to have intended to grant such a power because of the constitutional and institutional limits on the competence of the police. But Parliament does not appear to have felt such qualms in giving the initial responsibility for the devising of guidelines to ACPO and, as Lord Dyson JSC has pointed out, no question of constitutional competence arises.

93 Finally, I agree with Lord Dyson JSC's conclusion on the discrete issue of GC's photographs.

LORD RODGER OF EARLSFERRY JSC

Dissenting judgments on the appropriate relief

94 In September 1984 Sir Alec Jeffreys made his ground-breaking discovery of DNA "fingerprints". A few weeks later, on 31 October, the Police and Criminal Evidence Act 1984 ("PACE") was enacted. Within a few years Sir Alec's discovery was being used routinely in the criminal courts in this country. Section 64(1) of PACE, as originally enacted in ignorance of this major development that lay just ahead, provided:

"If— (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) he is cleared of that offence, they must be destroyed as soon as is practicable after the conclusion of the proceedings."

95 In January 1997 an unidentified intruder raped and assaulted a woman in her home in London. Swabs were taken from her and were found to contain semen. A DNA profile was obtained from the semen and placed on the national DNA database. In January 1998 a man was arrested for an unrelated offence of burglary. A saliva sample was taken from him and a DNA profile was derived from it. In August of the same year the man was acquitted of the burglary and, by virtue of section 64(1) of PACE, his sample should have been destroyed. In fact, however, his profile was left on the DNA database and in October a match was made between this profile and the DNA profile derived from the semen in the swabs taken from the

woman who had been raped in January 1997. The man was arrested and a DNA profile was obtained from a hair plucked from him. As was to be expected, this profile also matched the DNA derived from the semen. At his trial for the rape the judge held, however, that, since the material which had led to his identification should have been destroyed as required by section 64(1), the evidence relating to the profile from the plucked hair was not admissible. The man was acquitted. The Attorney General referred the matter to the Court of Appeal who agreed with the judge but referred the point to the House of Lords. In Attorney General's Reference (No 3 of 1999) [2001] 2 AC 91 the House reversed the Court of Appeal. The speech of Lord Steyn, with which the other members of the Appellate Committee agreed, was notable for his observation, at p 118, that the "austere" interpretation of the Court of Appeal produced results which were "contrary to good sense".

96 For present purposes, that case is important because it alerted the public and politicians to the fact that the obligation under section 64(1) of PACE to destroy samples if the suspect was acquitted meant that evidence ***1257** which might lead to the detection and prosecution of the perpetrators of other crimes would be lost. Just a few weeks after their Lordships' decision, in the course of the second reading debate on the Criminal Justice and Police Bill, the Home Secretary introduced Part IV of the Bill which, he explained, was designed, inter alia, to amend section 64(1) of PACE to prevent evidence being lost in this way. The Home Secretary referred to Lord Steyn's speech as demonstrating the need for the change: Hansard (HC Debates), 29 January 2001, col 42.

97 This history shows beyond doubt that Parliament's purpose in enacting section 82 of the Criminal Justice and Police Act 2001, which inserted section 64(1A) into PACE, was to ensure that, in future, instead of being destroyed, samples taken from suspects would be retained indefinitely and so remain available to the police on the national DNA database. This would protect the public by facilitating the detection and prosecution of the perpetrators of crimes. Section 64(1A) (as inserted by section 82 of the Criminal Justice and Police Act 2001 and amended by sections 117(7) and 118(4)(a) of the Serious Organised Crime and Police Act 2005) provides:

"Where— (a) fingerprints, impressions of footwear or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints, impressions of footwear or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came."

98 After this provision came into force, in accordance with guidelines from the Association of Chief Police Officers ("ACPO") the police proceeded to retain data indefinitely and so to build up their DNA database of samples and profiles obtained from people who had been suspected of crimes, even if they had not been prosecuted or had been acquitted.

99 In due course in two appeals to the House of Lords this system was challenged as being in violation of the suspects' article 8 Convention rights: *R (S) v Chief Constable of the South*

Yorkshire Police ; R (Marper) v Chief Constable of the South Yorkshire Police [2004] 1 WLR 2196 . In the leading speech Lord Steyn said, at para 2, that "as a matter of policy it is a high priority that police forces should expand the use of [DNA] evidence where possible and practicable". He went on to refer to public disquiet that the obligation to destroy samples under the unamended section 64(1) of PACE had sometimes enabled defendants who had in all likelihood committed grave crimes to walk free. Baroness Hale of Richmond observed, at para 78, that

"The present system is designed to allow the collection of as many samples as possible and to retain as much as possible of what it has. The benefit to the aims of accurate and efficient law enforcement is thereby enhanced."

100 In the light of such considerations the House of Lords held unanimously that the system did not violate the applicants' article 8 Convention rights.

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101 To the European Court of Human Rights, however, the matter appeared differently. In *S v United Kingdom* 48 EHRR 1169 the Grand Chamber first held unanimously and contrary to the majority view in the House of Lords that the English system did indeed involve an interference with suspects' article 8 rights. Then, when considering the proportionality of that interference, the court observed, at para 119:

"In this respect, the court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken and retained from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."

The court went on to conclude, at para 125:

"that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent state has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."

102 In response to the European court's judgment the last Parliament passed the Crime and Security Act 2010, section 14 of which was designed to amend section 64 of PACE with a view to establishing a regime for the retention and destruction of DNA material and profiles that would be compatible with article 8 as interpreted by the European court. The new Government, which came into office in May 2010, decided, however, not to commence this legislation. Instead, in Chapter 1 of Part 1 of the Protection of Freedoms Bill, it has put fresh legislative proposals, along similar lines to the legislation in Scotland, before Parliament. There were indications in the European court's judgment that a system along those lines would indeed be compatible with article 8. As in the earlier legislation, the complex proposals include provision for a National DNA Database Strategy Board to oversee the operation of the DNA database.

103 Obviously, in the light of the European court's judgment the indefinite retention of the data relating to the claimants under the existing system is incompatible with their article 8 rights. The decision of the House of Lords to the contrary in **1259 R (S) v Chief Constable of the South Yorkshire Police ; R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 must accordingly be overruled. That is accepted by the respondent, the Commissioner of Police of the Metropolis, and by the Home Secretary, who has intervened in the proceedings. Where the commissioner and the Home Secretary part company with the claimants is as to the order, if any, which the court should pronounce in these circumstances.

104 In effect, for the claimant C Mr Fordham argued that section 64(1A) is worded ("may be retained") so as to give the commissioner and chief constables an open discretion as to whether data should be retained and, if so, for how long and subject to what conditions. The position was therefore quite straightforward. By virtue of section 6(1) of the Human Rights Act 1998 the commissioner and chief constables were obliged to exercise that discretion so as to establish and maintain a system for the retention of samples and data that would comply with suspects' article 8 Convention rights as they are now to be interpreted in the light of the decision of the European court. It was unlawful for them not to do so. Mr Fordham indicated that he would be content for the court to pronounce a declaration to this effect, without making any order for the removal of the data relating to his client. While adopting the bulk of Mr Fordham's submissions, on behalf of the claimant GC, Mr Cragg asked the court to go further and indicate that in his case the position should be put right within 28 days.

105 Mr Fordham's argument is, of course, unanswerable if he is right to say that the crucial words ("may be retained") in section 64(1A) confer a wide—indeed open—discretion on the commissioner and the chief constables whose forces retain the samples and data that make up the national DNA database. If that is correct, then, even though, when section 64(1A) came into force, ACPO issued guidelines requiring that—subject to a narrow exception—all the DNA samples and data relating to suspects should be retained indefinitely, the association could with equal propriety have issued completely different guidelines which would have resulted in a system that did not provide for the indefinite retention of the samples and data. On that interpretation, any credit for the creation of the present DNA database is to be accorded to ACPO for choosing, of its own freewill, to issue the guidelines which it did. More particularly, since ACPO had been, and still was, free to adopt other

completely different guidelines, ACPO could now issue fresh guidelines which would produce a system that was compatible with the European court's judgment.

106 The key question, therefore, is whether Mr Fordham's construction of section 64(1A) as conferring this wide discretion on the police is correct. On behalf of the commissioner Lord Pannick argued that it is not. He drew attention to the context, which I have already described, in which Parliament enacted section 64(1A). This showed that Parliament had set out to cure the mischief that the original version of section 64(1) of PACE meant that suspects' samples and data were removed from the database even although—as Attorney General's Reference (No 3 of 1999) [2001] 2 AC 91 demonstrated—the retention of that material could potentially result in the detection and prosecution of serious criminals. Parliament plainly intended that in future this material should be retained on the DNA database indefinitely. In other words, under section 64(1A) the police had to retain it indefinitely. Mr Fordham said, rhetorically, that, if this were correct, then the Home Secretary could have brought proceedings against the police if they had failed to retain the material indefinitely. Accepting the challenge, ***1260** Mr Eadie said that, while the matter would probably have been sorted out in a different way, if necessary, such proceedings could indeed have been brought.

107 It is useful to notice just how far reaching Mr Fordham's argument is: essentially, under section 64(1A) the police were free to do what they liked. On his approach the provision contained nothing to delimit the exercise of their discretion. When listening to his argument, at times I felt that—unconsciously, of course—he was intent on pulling down one of the most important bulwarks which our predecessors so painstakingly erected against arbitrary acts of the executive. In *Car Owners' Mutual Insurance Co Ltd v Treasurer of the Commonwealth of Australia* [1970] AC 527, 537 E - F, Lord Wilberforce observed that "in a statutory framework it is impossible to conceive of a discretion not controlled by any standard or consideration stated, or to be elicited from, the terms of the Act". He was, of course, reflecting the thinking in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 B - D, where Lord Reid had said that

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court."

108 Following that classic authority, in my view the power which was conferred on the police by section 64(1A) had to be exercised in accord with the policy and objects of that enactment. As I have explained, the policy and objects of Parliament in enacting section 64(1A) were plainly that DNA samples and data derived from suspects should be retained indefinitely so that a large and expanding database should be available to aid the detection and prosecution of the perpetrators of crimes. The police were therefore bound to exercise the power given to them by section 64(1A) in order to promote that policy and those objects. This meant, in effect, that, subject to possible very narrow exceptions (eg, those suspected of a crime which turned out not to be a crime at all), the police had to retain on their database the samples and profiles of all suspects. In short, the police were under a duty to do so. By a slightly different route this analysis reaches the same result as the older well

known line of authority to the effect that, on the proper construction of a statute as a whole and in its context, it can sometimes be seen that a power granted to, say, an official, court or other body in the public interest must be regarded as having been coupled with an implied duty on the recipient to exercise the power in the circumstances envisaged for its exercise. See, for instance, *Julius v Bishop of Oxford* (1880) 5 App Cas 214 ; *Attorney General v Antigua Times Ltd* [1976] AC 16 , 33 F - G , per Lord Fraser of Tullybelton.

109 In my view, therefore, given the policy and objects of the enactment, before the decision of the European court the police could not have exercised their power under section 64(1A) by choosing to retain samples and data for, say, only three years (or any other period deliberately not prescribed in the legislation) and then destroying them. Similarly, given the policy and objects of the enactment, the police could not have exercised the power to detain material indefinitely by choosing to delete material from those against whom, in their view, suspicion fell below some arbitrary level not recognised in the legislation. Any such exercise of their power would ***1261** have defeated, rather than promoted, the policy of the enactment and would therefore have been unlawful.

110 In the light of the European court's decision, it can now be seen that the policy and objects of section 64(1A) , to create a virtually comprehensive and expanding database of DNA profiles from suspects, violate the article 8 Convention rights of unconvicted suspects. Given that the Protection of Freedoms Bill has been introduced into Parliament, there is good reason to believe that legislation will be passed in the foreseeable future to establish a new system. The question in the present proceedings is whether in the meantime, by virtue of section 3(1) of the HRA or otherwise, the police must read and give effect to section 64(1A) in a way that is compatible with article 8 as interpreted by the European court—and whether they act unlawfully if they do not.

111 Since I reject Mr Fordham's argument that section 64(1A) gives the police an open discretion as to what to do, I also reject his further, seductive, argument that, having regard to section 6(1) of the HRA , they can and should simply exercise that discretion in such a way as to establish a lawful system that meets the requirements of the European Court of Human Rights—for example, by choosing to retain samples and data for only three years, subject, perhaps, to a power in an independent body to extend the period for some further defined period (as under the Scottish legislation), or by only retaining the material from those suspected of certain classes of crimes, or by only retaining the material from those against whom there is a high degree of suspicion etc.

112 All of those suggested steps would have been inconsistent with the policy and objects of section 64(1A) as originally enacted. So they could only be adopted now, in order to comply with the European court's decision, if section 3(1) of the HRA makes that not only possible but indeed obligatory.

113 Section 3 provides:

“(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

"(2) This section— (a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

The opening phrase in subsection (1) shows that there are limits to the duty which it imposes. The words of Lord Nicholls of Birkenhead in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, para 40, are a useful guide to where those limits lie:

"For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for ***1262** rendering the statutory provision Convention compliant by legitimate use of the process of interpretation."

114 Mr Fordham submitted that the fundamental feature of section 64(1A) was the retention of the material for the purposes of creating a DNA database, not the indefinite retention of the material with a view to establishing a virtually comprehensive database of DNA material from suspects. In my view that submission is unrealistic. The truth is that Parliament wanted to eliminate the danger, which existed under the pre-existing legislation, that valuable evidence would be lost and potential prosecutions of the guilty based on the latest science would be jeopardised if material had to be removed from the database. Providing for the material to be retained on the database indefinitely was therefore *the* fundamental feature of the amending legislation which inserted section 64(1A) into PACE.

115 That being so, section 3(1) of the HRA does not oblige or permit the courts or the police to read or give effect to section 64(1A) in a way that departs substantially from that fundamental feature. And it is quite obvious that any reading of section 64(1A) which would be apt to obviate the defects identified in the existing system by the European court would depart very substantially indeed from that fundamental feature of the provision—would, indeed, contradict it. It is therefore nothing to the point that, from a linguistic point of view, the provision might easily be read as though it said that samples "may be retained, *consistently with the suspects' article 8 Convention rights* ..." The hypothetical additional words, though few in number, would have the effect, and would be intended to have the effect, of altering the provision so as, say, to limit the samples and data that were to be retained and the time for which they could be retained, and to impose a duty to remove them after that time—and so to negate the defining feature of the legislation. In other words, the court would have crossed the line from interpreting to amending the legislation. Amending section 64(1A) in that way is something which only Parliament can do. Parliament showed itself willing to pass amending legislation in the Crime and Security Act 2010. The fact that the new Government decided not to commence that legislation, but chose to introduce a Bill providing for a different scheme shows that there is a range of possible ways to bring the

system into line with the requirements of article 8 and room for doubt about which is the best policy to adopt. This court is in no position to weigh the competing practical advantages and disadvantages of the possible solutions. These are further features which confirm that the necessary changes require legislation and cannot be made by any legitimate interpretation, however extensive, under section 3(1) : In re S (Minors) (Care Order: Implementation of Care Plan) [2002] 2 AC 291 , para 40, per Lord Nicholls.

116 Section 64(1A) is therefore incompatible with suspects' article 8 Convention rights and cannot be made compatible under section 3(1) of the HRA . Section 3(2)(b) ensures that in these circumstances the continuing operation of section 64(1A) is unaffected. Section 6(1)(2) provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

"(2) Subsection (1) does not apply to an act if— (a) as the result of one or more provisions of primary legislation, the authority could not have ***1263** acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

Like sections 3(2) and 4(6), section 6(2) is concerned to preserve the primacy and legitimacy of primary legislation. See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 , para 19, per Lord Nicholls, cited with approval by Lord Hoffmann in *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 , para 51. If that is correct and section 3(1) of the HRA cannot be invoked in the present case, then section 64(1A) continues to operate, and Parliament intends it to operate, in the same way as when enacted. It therefore falls to be interpreted and applied just as when enacted.

117 It is accepted that section 6(2)(a) applies to cases where the legislation, which cannot be read compatibly with Convention rights, imposed a duty on a public authority to act in one particular way-the authority "could not have acted differently". It follows, of course-as Lord Hoffmann remarked in the Hooper case, para 49-that, by contrast, section 6(2)(b)

"assumes that the public authority could have acted differently but nevertheless excludes liability if it was giving effect to a statutory provision which cannot be read as Convention-compliant in accordance with section 3."

118 Since the Convention-non-compliant provision continues to operate, any public authority which is exercising a power conferred by it must continue do so in a way that promotes the object and purposes for which the provision confers the power-and these are, ex hypothesi, incompatible with Convention rights. As Lord Hoffmann noted, section 6(2)(b) assumes, however, that under the relevant legislation the public authority could have acted in more than one way. For example, it might be that a public authority could have adopted either of two schemes, A and B, both of which would have promoted the policy and objects of the legislation. So it cannot be said that, when it chose to adopt scheme A, the public authority could not have acted differently. Nevertheless, since, when it adopted scheme A, the

authority was promoting the policy and objects of the primary legislation and so was acting to give effect to the legislation, section 6(2)(b) disapplies section 6(1) and ensures that the authority was acting lawfully. In this way the primacy and legitimacy of the provision of primary legislation are preserved.

119 For all the reasons which I have set out, in the present case, in substance the police could really not have acted differently: in order to promote the object and purposes of section 64(1A) of PACE, they had to retain all the samples which they did, indefinitely. If that is so, then what the police did, and continue to do, falls within section 6(2)(a) and is accordingly lawful.

120 Even if one assumes, however, that, while promoting the policy and objects of the legislation, the police could, for example, have recognised a slightly wider exception and so created a slightly different system, that does not matter. The same goes if, while promoting the policy and objects of the *1264 legislation, the police could have chosen not to recognise even the very narrow exception which they did and could have decided to retain the samples and data relating to absolutely all suspects. In either event, even though the police could have done something (slightly) different, by doing what they actually did and are still doing, they were acting and are continuing to act so as to give effect to section 64(1A). Section 6(2)(b) of the HRA accordingly applies and so the police have at all times acted, and continue to act, lawfully.

121 In these circumstances section 64(1A) is incompatible with suspects' article 8 Convention rights. Even though Parliament and the Government have the matter under review, I consider that the better course is for this court to grant a declaration of incompatibility in terms of section 4(2) of the HRA. Cf *Bellinger v Bellinger* (Lord Chancellor intervening) [2003] 2 AC 467, para 55, per Lord Nicholls of Birkenhead. I would accordingly allow the appeals to the extent of making a declaration that section 64(1A) of the Police and Criminal Evidence Act 1984 is incompatible with the article 8 Convention rights of suspects.

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

122 On 4 December 2008 the Grand Chamber of the European Court of Human Rights in *S v United Kingdom* 48 EHRR 1169 condemned on article 8 grounds the scheme for the indefinite retention of biometric data adopted in England and Wales pursuant to section 64(1A) of the Police and Criminal Evidence Act 1984 ("PACE"). The critical issue for decision on these appeals is whether, following that decision and pending the enactment by Government of a fresh legislative scheme compatible with article 8, the police have been acting unlawfully in continuing to operate the indefinite retention scheme. That in turn depends upon whether section 64(1A) can or "cannot be read or given effect in a way which is compatible with the Convention rights" within the meaning of section 6(2)(b) of the Human Rights Act 1998 ("the HRA").

123 Before turning to address this issue it is necessary to sketch out something of the background to the appeal and the circumstances in which the point now arises for decision.

124 These claimants are two amongst the 850,000 odd unconvicted persons whose profiles are kept on the national DNA database, their fingerprints and samples having been taken

from them when they were arrested as suspects (from 2003, whether or not they were actually charged). This database has built up following Parliament's introduction on 11 May 2001 of section 64(1A) of PACE in substitution for the original section 64(1) which had required the destruction of a suspect's fingerprints and samples as soon as practicable after he was cleared. Section 64(1A) provides so far as is material:

"Where ... fingerprints, impressions of footwear or samples are taken from a person in connection with the investigation of an offence ... [they] may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came."

***1265**

125 In 2004 this change in the law was unsuccessfully challenged, principally on article 8 grounds, all the way up to the House of Lords, by two complainants: S, an 11-year-old boy with no previous convictions who had been acquitted of attempted robbery, and Mr Harper, a man of 38, also of good character, whose case was discontinued following his arrest on the charge of harassing his partner: *R (S) v Chief Constable of the South Yorkshire Police ; R (Harper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 . Baroness Hale of Richmond alone amongst the Appellate Committee thought that the retention and storage of DNA profiles constituted an interference with the applicants' rights under article 8 . But each member of the Committee, Baroness Hale included, was quite clear that, even if it did, it was readily justifiable under article 8.2 . Lord Steyn described such evidence as having "the inestimable value of cogency and objectivity" (para 1) and said that "as a matter of policy it is a high priority that police forces should expand the use of such evidence where possible and practicable": see para 2. At para 3 he observed that: "It can play a significant role in the elimination of the innocent, the correction of miscarriages of justice and the detection of the guilty." At paras 35-36 Lord Steyn dealt with a submission that retention is not "in accordance with law" (on the basis that "a law which confers a discretion must indicate the scope of that discretion": *Silver v United Kingdom* (1983) 5 EHRR 347 , para 88):

"The discretion involved in the power to retain fingerprints and samples makes allowance for exceptional circumstances, eg where an undertaking to destroy the fingerprints or sample was given or where they should not have been taken in the first place, as revealed by subsequent malicious prosecution proceedings."

At para 38 Lord Steyn observed that the "expansion of the database by the retention confers enormous advantages in the fight against serious crime" and at para 39 he remarked upon "the benefits of a greatly extended database". Lord Rodger of Earlsferry and Lord Carswell agreed with Lord Steyn. Baroness Hale agreed that retention and storage of DNA samples and profiles was "readily justifiable" for the reasons given by Lord Steyn and myself. She added:

"The whole community, as well as the individuals whose samples are collected, benefits from there being as large a database as it is possible to have. The present system is designed to allow the collection of as many samples as possible and to retain as much as possible of what it has. The benefit to the aims of accurate and efficient law enforcement is thereby enhanced": para 78.

I myself suggested, at para 88,

"that the benefits of the larger database ... are so manifest ... that the cause of human rights generally (including the better protection of society against the scourge of crime which dreadfully afflicts the lives of so many of its victims) would inevitably be better served by the database's expansion than by its proposed contraction. The more complete the database, the better the chance of detecting criminals, both those guilty of crimes past and those whose crimes are yet to be committed. The better *1266 chance too of deterring from future crime those whose profiles are already on the database."

And I pointed out too that: "The larger the database, the less call there will be to round up the usual suspects. Instead, those amongst the usual suspects who are innocent will at once be exonerated."

126 These views notwithstanding, the Grand Chamber in Strasbourg, 48 EHRR 1169, as already indicated, on the application of the same complainants, some four years later unanimously condemned the scheme as unjustifiable under article 8 . It is sufficient for present purposes to quote just three paragraphs from the court's lengthy judgment:

"119. ... the court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken and retained from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."

"125. In conclusion, the court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent state has overstepped any acceptable margin of appreciation in this regard ..."

"134 ... In accordance with article 46 of the Convention, it will be for the respondent state to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the rights of the applicants and other persons in their position to respect for their private life."

Before turning to the circumstances in which these particular claimants had their fingerprints and samples taken and the precise nature of the argument they advance on this appeal, it is convenient first to indicate something of the response to the Grand Chamber's judgment, on the part both of the Government and of the police.

127 So far as the Government was concerned, the then Home Secretary in a Press Release on 16 December 2008 indicated that the Home Office would institute a consultation process but that meantime:

"The DNA of children under ten-the age of criminal responsibility-should no longer be held on the database. There are around 70 such cases *1267 [we are told that there were in fact 96], and we will take immediate steps to take them off."

(S and Mr Marper's data was also removed.)

128 On 7 May 2009 the Home Office published a White Paper, *Keeping the Right People on the DNA Database*, setting out certain key proposals for the future and inviting views upon them. The White Paper also considered what should happen to the 850,000 odd profiles already on the national DNA database.

129 On 28 July 2009 ACPO's Director of Information wrote to all chief constables indicating that new guidelines were not expected to take effect until 2010 and that:

"Until that time, the current retention policy on fingerprints and DNA remains unchanged ... ACPO strongly advise that decisions to remove records should not be based on proposed changes. It is therefore vitally important that any applications for removals of records should be considered against current legislation and the Retention Guidelines Exceptional Case Procedure ..."

Those guidelines, which have remained essentially the same since section 64(1A) was introduced, provide:

"Chief Officers have the discretion to authorise the deletion of any specific data entry on the PNC 'owned' by them. They are also responsible for the authorisation of the destruction of DNA and fingerprints associated with that specific entry. It is suggested that this discretion should only be exercised in exceptional cases ...

"Exceptional cases will by definition be rare. They might include cases where the original arrest or sampling was found to be unlawful. Additionally, where it is established beyond doubt that no offence existed, that might, having regard to all the circumstances, be viewed as an exceptional circumstance."

130 On 11 November 2009, following the consultation period, the Home Secretary made a written ministerial statement outlining a revised set of proposals for the retention of fingerprints and DNA data: Hansard (HC Debates), 11 November 2009, col 25WS. It was originally intended to implement these by way of order-making powers under the Policing and Crime Act 2009 but, following strong opposition to the introduction of a new scheme by secondary rather than primary legislation, the proposed new scheme was included in the Crime and Security Act 2010, introduced in the House of Commons on 19 November 2009 and receiving Royal Assent on 8 April 2010.

131 Following a change of government in May 2010, however, rather than bringing the Crime and Security Act into force, the incoming Government instead announced its proposal for new legislation designed essentially to mirror the Scottish system and this finally, by the Protection of Freedoms Bill 2011, introduced in the House of Commons as recently as 11 February 2011, it has now set in train.

132 For reasons which will shortly become clear, it is unnecessary for the purposes of this judgment to indicate anything of the detailed nature of the various proposals which at one time or another have been considered for ***1268** enactment in substitution for the existing scheme so as to achieve compatibility with article 8 pursuant to the Grand Chamber judgment. It is sufficient to indicate that a wide range of differing schemes have been canvassed and considered and that arriving at the preferred solution has inevitably involved complex and sensitive choices.

133 It is similarly unnecessary to describe in any detail the facts of these claimants' cases and the following brief summary will suffice.

134 GC is 41. On 20 December 2007, following his girlfriend's complaint that he had assaulted her (albeit without causing her injury), he voluntarily attended the police station and was arrested on suspicion of common assault. He strongly denied the allegation, explaining rather that he had been defending himself against attack by her. Following the taking of DNA samples, fingerprints and a photograph, GC was released on police bail without charge. Before 21 February 2008, when he was due to surrender to his bail, GC was told that no further action would be taken against him. GC's fingerprints (but not DNA) had in fact been taken previously and retained in connection with a firearms offence for which he had been sentenced at the Central Criminal Court on 18 February 1992 to seven years' imprisonment.

135 C is 34, a man of good character. On 17 March 2009 he was arrested on suspicion of rape, harassment and fraud following allegations made the previous day by a former girlfriend and members of her family, allegations which C strenuously denied. The same day, C's fingerprints and DNA samples were taken. Although no further action was taken in relation to the alleged harassment and fraud, on 18 March 2009 C was charged with rape. On 5 May 2009, however, the prosecution offered no evidence on the rape charge and C was accordingly acquitted.

136 Both claimants, through solicitors, applied to the respondent police commissioner to have their fingerprints and DNA data deleted from police records—GC on 23 March 2009, C

on 19 August 2009 (in each case, of course, after the Grand Chamber's decision in *S v United Kingdom* 48 EHRR 1169). Consistently with ACPO's guidelines, however, both applications were refused.

137 The claimants then issued judicial review proceedings, GC on 11 December 2009, C on 9 February 2010. The applications were heard together by the Divisional Court (Moses LJ and Wyn Williams J) on 15 July 2010 and on 16 July 2010 were dismissed, the Divisional Court correctly holding itself bound by the decision of the House of Lords in *R (S) v Chief Constable of the South Yorkshire Police ; R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 (the subsequent Grand Chamber decision notwithstanding). The Divisional Court did, however, certify a point of law of general importance and, with the consent of all parties, granted a certificate pursuant to section 12 of the Administration of Justice Act 1969 , thus enabling the matter to proceed directly to this court.

138 Before this court, Mr Fordham for C and Mr Cragg for GC both submit that, in the light of the Grand Chamber's judgment, the earlier decision of the House of Lords can no longer stand and the existing scheme must now be recognised to be unlawful—so much, indeed, is clear and conceded. Pursuant to section 6 of the HRA , their argument then continues, the police must now therefore cease retaining their data incompatibly with their article 8 rights. Instead, they submit, the police must take account of ***1269** the various criticisms made by the Grand Chamber of the existing scheme, must devise a new, compatible scheme, and must then deal with these claimants' requests (and any other outstanding or future requests) for the removal of information from the national DNA database—this, indeed, in GC's case, within 28 days, contends Mr Cragg.

139 Not so, submit Lord Pannick for the Commissioner of Police of the Metropolis and Mr Eadie for the Home Secretary (properly joined in the proceedings as an interested party). It is, they submit, for the Government, not for the police, to devise and enact a new scheme; the police meantime have no alternative but to continue operating the existing scheme pursuant to section 64(1A) of PACE . Their case is founded on section 6(2)(b) of the HRA which, they argue, disapplies section 6(1) and thus relieves the police of liability for continuing to operate what the Grand Chamber has ruled to be (in international law) an unlawful scheme. The most the claimants are entitled to is a declaration of incompatibility pursuant to section 4 of the HRA .

140 As I indicated at the outset, this is the critical issue in the appeal and plainly it centres upon the proper understanding of, and interplay between, sections 3, 4 and 6 of the HRA which (as to their most material parts) I now set out:

"3

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

"4

(2) If the court is satisfied that [a provision of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility."

"6

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

"6

(2) Subsection (1) does not apply to an act if— (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

The precise symmetry between section 3(1) and section 6(2)(b) will at once be noted: each invites consideration of whether legislation can "be read or given effect in a way which is [Convention] compatible"— section 3 indicating what must be done if this is "possible", section 6(2)(b) indicating the consequence (the disapplication of section 6(1)) if it is not.

141 At first blush the commissioner's argument appears distinctly unpromising. Section 64 (1A) is, after all, couched in terms that appear to confer on the police an open discretion: "samples may be retained." On the face of it, therefore, the police appear to be in a position to act compatibly with the article 8 rights of those whose samples have been taken and this, indeed, even without resort to section 3 . But suppose there were some doubt about this, why would that not fall to be resolved by the interpretative imperative of section 3 ? How can it be appropriate, in the face of such a strong statutory direction, to place upon section 64 (1A) a construction which denies the police the ability to exercise their data retention power compatibly? I confess to having come only comparatively late to the ***1270** conclusion that, difficult though the commissioner's argument initially appears, it is in fact correct.

142 Section 6(2)(b) has long been recognised to give rise to difficulty at the margins: see, for example, the judgments respectively of Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Mance in *Doherty v Birmingham City Council* [2009] AC 367 . Clearly, as Lord Hoffmann observed in *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 , para 49, section 6(2)(b)

"assumes that the public authority could have acted differently but nevertheless excludes liability if it was giving effect to a statutory provision which cannot be read as Convention-compliant in accordance with section 3."

This, as was pointed out, was in contradistinction to section 6(2)(a) which applies when a public authority "could not have acted differently"—when, in other words, the authority has been compelled by primary legislation to act in a way *ex hypothesi* incompatible with Convention rights.

143 Superficially, of course, the very assumption that a public authority could have acted differently appears to postulate that the power in question could therefore have been

exercised compatibly with Convention rights. Plainly, however, section 3 notwithstanding, it cannot follow that the power *must* therefore in all cases be exercised compatibly—else section 6(2)(b) could never come into play. A simple illustration of section 6(2)(b) in operation is, of course, where primary legislation confers a power on a public authority and where a decision to exercise that power (or, as the case may be, not to exercise it) would in every case inevitably give rise to an incompatibility. *R v Kansal (No 2)* [2002] 2 AC 69 was just such a case and in such situations it can readily be understood why section 6(2)(b) applies. Otherwise, instead of “giving effect to” a provision conferring a power, the public authority would have to treat the provision (in cases where not to exercise it would give rise to incompatibility) as if it imposed a duty—or, in cases where any exercise of the power would give rise to incompatibility (as in *R v Kansal (No 2)* itself), would have to abstain from ever exercising the power. In either instance, it is obvious, Parliament's will would be thwarted.

144 I would take this opportunity to resile from what I myself said in the latter part of para 118 of my own judgment in the *Hooper* case [2005] 1 WLR 1681. I was surely right to say in the first part of that paragraph:

“Plainly it is not the case that section 6(2)(b) applies whenever a statutory discretion falls to be exercised in a particular way to ensure compliance with a Convention right. This occurs in a host of different situations and, so far as I am aware, no one has ever suggested that, had the discretion not been exercised compatibly, the public authority would nevertheless have been protected against a domestic law claim by the section 6(2)(b) defence on the basis that otherwise a power would be turned into a duty.”

I was, however, wrong to suggest that the situation would be no different if to secure Convention compliance the statutory discretion had to be exercised in every case. It now seems to me that the underlying question in all these cases—indeed, the determinative question in every case lying between the two extremes I have thus far dealt with—is: what essentially was Parliament ***1271** intent on achieving by this legislation? Is it or is it not something which could realistically be achieved consistently with the observance of Convention rights? If it is, then it must be so construed and applied. If, however, it is not, then section 6(2)(b) will apply: the legislation will be incompatible, a declaration of incompatibility may be made, and the public authority will be immune from liability.

145 In short, the question to be asked in deciding whether section 6(2)(b) applies is essentially the same question as is more usually asked under section 3 when deciding whether or not, by a strained construction of apparently incompatible legislation, “it is possible” to read and give effect to it compatibly with Convention rights. Would such a construction depart substantially from a fundamental feature of the legislation? Would it be inconsistent with the underlying thrust of the legislation? Would it go with the grain of the legislation? Would it violate a cardinal principle of the legislation? Would it remove its pith and substance? Would it create an entirely different scheme? The court must not cross the boundary from interpretation into legislation. All these familiar concepts and phrases are to be found in the well known cases on section 3 but their importance has hitherto not perhaps been fully recognised in the context also of section 6(2)(b).

146 It is time to return to section 64(1A) of PACE and in the light of these considerations to ask whether realistically it could be construed for all the world as if, in enacting it, the Government was leaving it to individual police forces—or even to ACPO acting on their joint behalf—to decide upon just what sort of scheme should be implemented for the future retention of biometric data. Is it really suggested that the police could and should then (in 2001) of their own volition have decided that, instead of retaining data indefinitely, they would retain it for only, say, one year or five years, or different periods in different cases and so forth? And if this was not open to them in 2001, how then could it become so merely because of the Grand Chamber's condemnation of the indefinite scheme some years later? As Lord Nicholls of Birkenhead observed in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33, when indicating the limits of the court's section 3 powers: "There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation." It is difficult to think of any case in which that objection to a section 3 construction applies more obviously than here. Lord Steyn reflected the same objection in the same case (para 49): "Interpretation could not provide a substitute scheme." It is surely plain that legislative deliberation was required here.

147 DNA retention can only sensibly operate on a national basis and section 64(1A), properly understood, in my judgment not merely authorised but required precisely the sort of scheme for the indefinite retention of biometric data that the House of Lords came to describe (and, indeed, so enthusiastically to support, in my case unrepentingly) in the *S; Marper* case [2004] 1 WLR 2196. Realistically it was just not possible to construe the section differently, least of all as authorising the police to create for themselves a fundamentally different scheme which would achieve compatibility with the requirements of article 8 as subsequently identified by the Grand Chamber. Of course, some degree of latitude was given to the police as to how precisely the retention scheme was to operate. But this was ***1272** essentially to decide what narrow categories should be excluded from its scope—cases of the sort described by Lord Steyn at para 36 of the *S; Marper* case (see para 125 above) and, indeed, in the ACPO guidelines: see para 129 above. The discretion could not sensibly be construed as extending to the basic nature of the scheme: whether retention should be indefinite or time-limited.

148 That section 64(1A) was intended to introduce a database for the indefinite retention of DNA samples is surely clear from the very circumstances in which this legislative change was brought about—the deeply disturbing circumstances in which a violent rapist and a brutal murderer had both gone free because of the unsatisfactory existing scheme—see Attorney General's Reference (No 3 of 1999) [2001] 2 AC 91 and *In re British Broadcasting Corp'n* [2010] 1 AC 145 and, indeed, to my mind clear also from the speeches in the House in the *S* and *Marper* case to which I have already referred. One of the specific issues before the House in the *S* and *Marper* case was, it should be noted: "(4) if the retention of fingerprints and DNA profiles and/or samples is an unjustified interference with the appellants' Convention rights, whether it would be possible to give section 64(1A) a Convention-compatible interpretation under section 3 of the 1998 Act" (Lord Steyn's judgment at para 17)—an issue, of course, as Lord Steyn observed at para 57, that in the event fell away. In short, the argument before the House assumed that section 64(1A) called for the indefinite retention of

data and that, if this was incompatible with article 8, the appellants then needed to resort to section 3 of HRA for their requests for data removal to succeed.

149 The claimants here submit that, following the Grand Chamber judgment, it was open to the police to adjust their data retention policy to meet the newly recognised requirements of article 8 in just the same way as they were required by this court in *R (L) v Comr of Police of the Metropolis* [2010] 1 AC 410 on article 8 grounds to adjust their previous approach to the disclosure of information for the purposes of enhanced criminal record certificates (ECRCs) pursuant to section 115(7) of the Police Act 1997. In my judgment, however, the two situations are entirely different: in the *L* case all that the court's decision required of the police was that in future they give no less weight to the statutory requirement that in their opinion the information *ought to be* included in the certificate than the requirement that they think it might be relevant (and in borderline cases give the prospective employee an opportunity to say why the information ought not to be disclosed). There was no requirement whatever for fresh policy choices to be made let alone "legislative deliberation" or democratic accountability. Rather the court was well able to decide the limited adjustment that needed to be made.

150 Contrast the position in the present case. The Grand Chamber, in para 134 of its judgment (see para 126 above), can hardly have been expecting the police, rather than the Government, to implement the newly required measures under the supervision of the Committee of Ministers. Correspondingly, the state's reaction to the Grand Chamber's judgment was that it was plainly for Government, not the police, to devise and implement a new and Convention-compliant scheme. It was, indeed, the Home Office rather than the police who decided that children under ten should be removed from the database: see para 127 above. No less significantly, the perceived need for a fully legitimate parliamentary solution to the problem was ***1273** manifested by the political insistence upon the new scheme being introduced by primary and not merely secondary legislation. If this was not appropriate by secondary legislation, how much less so by revised ACPO guidelines.

151 Even if it is suggested that section 64(1A) does not preclude ACPO from now amending their guidelines to address the Grand Chamber's criticisms in *S v United Kingdom* 48 EHRR 1169, that with respect is not a sufficient answer to the section 6(2)(b) defence. As I have said (para 143 above), the section 6(2)(b) defence necessarily postulates that the public authority *could* act differently. The critical question is whether they could do so consistently with the essential scheme and thrust of the legislation and a good test of that, I would suggest, is to ask whether it can really be said to be their *duty* to do so and to be unlawful and wrong for them *not* to do so. The whole purpose of section 6(2)(b) is to safeguard a public authority from liability (and, indeed, from misplaced criticism) in circumstances where in truth it is acting (as for my part I have no doubt that the police are acting here) perfectly properly.

152 It follows from all this that, in common with Lord Rodger of Earlsferry JSC, with whose judgment on the section 6 issue I respectfully agree, I would hold that it is not unlawful (under domestic law) for the respondent police commissioner to continue to hold the claimants' data on the national DNA database. As to whether this court should now make a declaration of incompatibility in respect of section 64(1A) I hold no strong view. Nowhere is

this identified as an issue before us and frankly I find it difficult to see any possible need or use for it in the present circumstances. But if others think it desirable, I would be quite content with that.

153 I would add that, even had I concluded that the police *could* now act compatibly with article 8 under section 64(1A), I should certainly not have thought it "just and appropriate" within the meaning of section 8 of the HRA to require them to change their existing practice pending the introduction of a new legislative data retention scheme. It may be, indeed, that the strength of this reaction to the commissioner's fallback argument under section 8, on true analysis, reinforces the correctness of my primary conclusion on the section 6 issue: quite simply it would be wrong for the police to change their approach to section 64(1A) before Parliament so dictates and this court cannot properly direct them to do so. If anyone is to be criticised for the failure of the existing database to meet the state's obligations under article 8, it is surely the Government, not the police. In my judgment they have a section 6 (2)(b) defence to these claims.

Appeals allowed.

Jill Sutherland, Barrister

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1. Police and Criminal Evidence Act 1984, s 64(1A), as inserted and amended: see post, para 3.

2. Human Rights Act 1998, s 3: see post, para 113. Sch 1, Pt I, art 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

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SUPREME COURT OF CANADA

CITATION: R. v. Spencer, 2014 SCC 43, [2014] 2 S.C.R. 212

DATE: 20140613

DOCKET: 34644

BETWEEN:

Matthew David Spencer

Appellant

and

Her Majesty The Queen

Respondent

and

Director of Public Prosecutions,

Attorney General of Ontario,

Attorney General of Alberta,

Privacy Commissioner of Canada,

Canadian Civil Liberties Association and

Criminal Lawyers' Association of Ontario

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 87)

Cromwell J. (McLachlin C.J. and LeBel, Abella, Rothstein,
Moldaver, Karakatsanis and Wagner JJ. concurring)

R. v. SPENCER, 2014 SCC 43, [2014] S.C.R. 212

Matthew David Spencer

Appellant

v.

Her Majesty The Queen

Respondent

and

**Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Alberta,
Privacy Commissioner of Canada,
Canadian Civil Liberties Association and
Criminal Lawyers' Association of Ontario**

Interveners

Indexed as: R. v. Spencer

2014 SCC 43

File No.: 34644.

2013: December 9; 2014: June 13.*

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Search and seizure — Privacy

* A motion to amend the reasons was granted on November 6, 2014, amending para. 12. The amendments are included in these reasons.

— Police having information that IP address used to access or download child pornography — Police asking Internet service provider to voluntarily provide name and address of subscriber assigned to IP address — Police using information to obtain search warrant for accused's residence — Whether police conducted unconstitutional search by obtaining subscriber information matching IP address — Whether evidence obtained as a result should be excluded — Whether fault element of making child pornography available requires proof of positive facilitation — Criminal Code, R.S.C. 1985, c. C-46, ss. 163.1(3), (4), 487.014(1) — Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, s. 7(3)(c.1)(ii) — Canadian Charter of Rights and Freedoms, s. 8.

The police identified the Internet Protocol (IP) address of a computer that someone had been using to access and store child pornography through an Internet file-sharing program. They then obtained from the Internet Service Provider (ISP), without prior judicial authorization, the subscriber information associated with that IP address. The request was purportedly made pursuant to s. 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. This led them to the accused. He had downloaded child pornography into a folder that was accessible to other Internet users using the same file-sharing program. He was charged and convicted at trial of possession of child pornography and acquitted on a charge of making it available. The Court of Appeal upheld the conviction, however set aside the acquittal on the making available charge and ordered a new trial.

Held: The appeal should be dismissed.

Whether there is a reasonable expectation of privacy in the totality of the circumstances is assessed by considering and weighing a large number of interrelated factors. The main dispute in this case turns on the subject matter of the search and whether the accused's subjective expectation of privacy was reasonable. The two circumstances relevant to determining the reasonableness of his expectation of privacy in this case are the nature of the privacy interest at stake and the statutory and contractual framework governing the ISP's disclosure of subscriber information.

When defining the subject matter of a search, courts have looked not only at the nature of the precise information sought, but also at the nature of the information that it reveals. In this case, the subject matter of the search was not simply a name and address of someone in a contractual relationship with the ISP. Rather, it was the identity of an Internet subscriber which corresponded to particular Internet usage.

The nature of the privacy interest engaged by the state conduct turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. In this case, the primary concern is with informational privacy. Informational privacy is often equated with secrecy or confidentiality, and also includes the related but wider notion of control over, access to and use of information. However, particularly important in the context of Internet usage is the understanding of privacy as anonymity. The identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone

number found in the subscriber information. Subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating to an individual's identity as the source, possessor or user of that information. Some degree of anonymity is a feature of much Internet activity and depending on the totality of the circumstances, anonymity may be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure. In this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized in other circumstances as engaging significant privacy interests.

There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy. In this case, the contractual and statutory frameworks overlap and the relevant provisions provide little assistance in evaluating the reasonableness of the accused's expectation of privacy. Section 7(3)(c.1)(ii) of *PIPEDA* cannot be used as a factor to weigh against the existence of a reasonable expectation of privacy since the proper interpretation of the relevant provision itself depends on whether such a reasonable expectation of privacy exists. It would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat *PIPEDA*'s general prohibition on the disclosure of personal information without consent. The contractual provisions in this

case support the existence of a reasonable expectation of privacy. The request by the police had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. In the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. Therefore, the request by the police that the ISP voluntarily disclose such information amounts to a search.

Whether the search in this case was lawful will be dependent on whether the search was authorized by law. Neither s. 487.014(1) of the *Criminal Code*, nor *PIPEDA* creates any police search and seizure powers. Section 487.014(1) is a declaratory provision that confirms the existing common law powers of police officers to make enquiries. *PIPEDA* is a statute whose purpose is to increase the protection of personal information. Since in the circumstances of this case the police do not have the power to conduct a search for subscriber information in the absence of exigent circumstances or a reasonable law, the police do not gain a new search power through the combination of a declaratory provision and a provision enacted to promote the protection of personal information. The conduct of the search in this case therefore violated the *Charter*. Without the subscriber information obtained by the police, the warrant could not have been obtained. It follows that if that information is excluded from consideration as it must be because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant and the search of the residence was therefore unlawful and violated the *Charter*.

The police, however, were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. The nature of the police conduct in this case would not tend to bring the administration of justice into disrepute. While the impact of the *Charter*-infringing conduct on the *Charter*-protected interests of the accused weighs in favour of excluding the evidence, the offences here are serious. Society has a strong interest in the adjudication of the case and also in ensuring the justice system remains above reproach in its treatment of those charged with these serious offences. Balancing the three factors, the exclusion of the evidence rather than its admission would bring the administration of justice into disrepute. The admission of the evidence is therefore upheld.

There is no dispute that the accused in a prosecution under s. 163.1(3) of the *Criminal Code* must be proved to have had knowledge that the pornographic material was being made available. This does not require however, that the accused must knowingly, by some positive act, facilitate the availability of the material. The offence is complete once the accused knowingly makes pornography available to others. Given that wilful blindness was a live issue and that the trial judge's error in holding that a positive act was required to meet the *mens rea* component of the making available offence resulted in his not considering the wilful blindness issue, the error could reasonably be thought to have had a bearing on the trial judge's decision to acquit. The order for a new trial is affirmed.

Cases Cited

Referred to: *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Trapp*, 2011 SKCA 143, 377 Sask. R. 246; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. McNeice*, 2010 BCSC 1544 (CanLII); *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 163.1(3), (4), 487.014.

Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01, s. 29(2)(g).

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, ss. 3, 5(3), 7, Sch. 1, cl. 4.3.

Authors Cited

- Canada. Report of the Task Force established by the Department of Communications/Department of Justice. *Privacy and Computers*. Ottawa: Information Canada, 1972.
- Gleicher, Nathaniel. "Neither a Customer Nor a Subscriber Be: Regulating the Release of User Information on the World Wide Web" (2009), 118 *Yale L.J.* 1945.
- Guterman, Melvin. "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988), 39 *Syracuse L. Rev.* 647.
- Hubbard, Robert W., Peter DeFreitas and Susan Magotiaux. "The Internet — Expectations of Privacy in a New Context" (2002), 45 *Crim. L.Q.* 170.
- Hunt, Chris D. L. "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011), 37 *Queen's L.J.* 167.
- Paton-Simpson, Elizabeth. "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305.
- Slane, Andrea, and Lisa M. Austin. "What's In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations" (2011), 57 *Crim. L.Q.* 486.
- Westin, Alan F. *Privacy and Freedom*. New York: Atheneum, 1970.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Cameron, Ottenbreit and Caldwell JJ.A.), 2011 SKCA 144, 377 Sask. R. 280, 528 W.A.C. 280, [2012] 4 W.W.R. 425, 283 C.C.C. (3d) 384, [2011] S.J. No. 729 (QL), 2011 CarswellSask 786, affirming the accused's conviction for possession of child pornography and setting aside the accused's acquittal for making available child pornography entered by Foley J., 2009 SKQB 341, 361 Sask. R. 1, [2009] S.J. No. 798 (QL), 2009 CarswellSask 905, and ordering a new trial. Appeal dismissed.

Aaron A. Fox, Q.C., and Darren Kraushaar, for the appellant.

Anthony B. Gerein, for the respondent.

Ronald C. Reimer and David Schermbrucker, for the intervener the Director of Public Prosecutions.

Susan Magotiaux and Allison Dellandrea, for the intervener the Attorney General of Ontario.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Mahmud Jamal, Patricia Kosseim, Daniel Caron and Sarah Speevak, for the intervener the Privacy Commissioner of Canada.

Anil K. Kapoor and Lindsay L. Daviau, for the intervener the Canadian Civil Liberties Association.

Jonathan Dawe and Jill R. Presser, for the intervener the Criminal Lawyers' Association of Ontario.

The judgment of the Court was delivered by

CROMWELL J. —

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I. Introduction

[1] The Internet raises a host of new and challenging questions about privacy. This appeal relates to one of them.

[2] The police identified the Internet Protocol (IP) address of a computer that someone had been using to access and store child pornography through an Internet file-sharing program. They then obtained from the Internet Service Provider (ISP), without prior judicial authorization, the subscriber information associated with that IP address. This led them to the appellant, Mr. Spencer. He had downloaded child pornography into a folder that was accessible to other Internet users using the same file-sharing program. He was charged and convicted at trial of possession of child pornography and acquitted on a charge of making it available.

[3] At trial, Mr. Spencer claimed that the police had conducted an unconstitutional search by obtaining subscriber information matching the IP address and that the evidence obtained as a result should be excluded. He also testified that he did not know that others could have access to the shared folder and argued that he therefore did not knowingly make the material in the folder available to others. The trial judge concluded that there had been no breach of Mr. Spencer's right to be secure against unreasonable searches and seizures. However, he was of the view that the "making available" offence required some "positive facilitation" of access to the pornography, which Mr. Spencer had not done, and further he believed Mr. Spencer's evidence that he did not know that others could access his folder so that the fault

element (*mens rea*) of the offence had not been proved. The judge therefore convicted Mr. Spencer of the possession offence, but acquitted him of the making available charge.

[4] The Court of Appeal upheld the conviction for possession of child pornography, agreeing with the trial judge that obtaining the subscriber information was not a search and holding that even if it were a search, it would have been reasonable. The court, however, set aside the acquittal on the making available charge on the basis that the trial judge had been wrong to require proof of positive facilitation of access by others to the material. A new trial was ordered on this charge.

[5] The appeal to this Court raises four issues which I would resolve as follows:

1. Did the police obtaining the subscriber information matching the IP address from the ISP constitute a search?

In my view, it did.

2. If so, was the search authorized by law?

In my view, it was not.

3. If not, should the evidence obtained as a result be excluded?

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In my view, the evidence should not be excluded.

4. Did the trial judge err with respect to the fault element of the “making available” offence?

The judge did err and I would uphold the Court of Appeal’s order for a new trial.

II. Analysis

A. *Did the Police Obtaining the Subscriber Information Matching the IP Address From the ISP Constitute a Search?*

[6] Mr. Spencer maintains that the police were conducting a search when they obtained the subscriber information associated with the IP address from the ISP, Shaw Communications Inc. The respondent Crown takes the opposite view. I agree with Mr. Spencer on this point. I will first set out a summary of the relevant facts then turn to the legal analysis.

(1) Facts and Judicial History

[7] Mr. Spencer, who lived with his sister, connected to the Internet through an account registered in his sister’s name. He used the file-sharing program LimeWire on his desktop computer to download child pornography from the Internet. LimeWire is a free peer-to-peer file-sharing program that, at the time, anyone could

download onto their computer. Peer-to-peer systems such as LimeWire allow users to download files directly from the computers of other users. LimeWire does not have one central database of files, but instead relies on its users to share their files directly with others. It is commonly used to download music and movies and can also be used to download both adult and child pornography. It was Mr. Spencer's use of the file-sharing software that brought him to the attention of the police and which ultimately led to the search at issue in this case.

[8] Det. Sgt. Darren Parisien (then Cst.) of the Saskatoon Police Service, by using publicly available software, searched for anyone sharing child pornography. He could access whatever another user of the software had in his or her shared folder. In other words, he could "see" what other users of the file-sharing software could "see". He could also obtain two numbers related to a given user: the IP address that corresponds to the particular Internet connection through which a computer accesses the Internet at the time and the globally unique identifier (GUID) number assigned to each computer using particular software. The IP address of the computer from which shared material is obtained is displayed as part of the file-sharing process. There is little information in the record about the nature of IP addresses in general or the IP addresses provided by Shaw to its subscribers. There is a description in *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at paras. 21-26, which also notes some of the differences that may exist among IP addresses. For the purposes of this case, what we know is that the IP address obtained by Det. Sgt. Parisien matched computer activity at the particular point in time that he was observing that activity.

[9] Det. Sgt. Parisien generated a list of IP addresses for computers that had shared what he believed to be child pornography. He then ran that list of IP addresses against a database which matches IP addresses with approximate locations. He found that one of the IP addresses was suspected to be in Saskatoon, with Shaw as the ISP.

[10] Det. Sgt. Parisien then determined that Mr. Spencer's computer was online and connected to LimeWire. As a result, he (along with any LimeWire user) was able to browse the shared folder. He saw an extensive amount of what he believed to be child pornography. What he lacked was knowledge of where exactly the computer was and who was using it.

[11] To connect the computer usage to a location and potentially a person, investigators made a written "law enforcement request" to Shaw for the subscriber information including the name, address and telephone number of the customer using that IP address. The request, which was purportedly made pursuant to s. 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (*PIPEDA*), indicated that police were investigating an offence under the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to child pornography and the Internet and that the subscriber information was being sought as part of an ongoing investigation. (The full text of the relevant statutory provisions is set out in an Appendix.) Investigators did not have or try to obtain a production order (i.e. the equivalent of a search warrant in this context).

[12] Shaw complied with the request and provided the name, address and

telephone number of the customer associated with the IP address, Mr. Spencer's sister. With this information in hand, the police obtained a warrant to search Ms. Spencer's home (where Mr. Spencer lived) and seize his computer, which they did. The search of Mr. Spencer's computer revealed about 50 child pornography images and two child pornography videos.

[13] Mr. Spencer was charged with possessing child pornography contrary to s. 163.1(4) of the *Criminal Code* and making child pornography available over the Internet contrary to s. 163.1(3). There is no dispute that the images found in his shared folder were child pornography.

[14] At trial, Mr. Spencer sought to exclude the evidence found on his computer on the basis that the police actions in obtaining his address from Shaw without prior judicial authorization amounted to an unreasonable search contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. The trial judge rejected this contention and convicted Mr. Spencer of the possession count. On appeal, the Saskatchewan Court of Appeal upheld the judge's decision with respect to the search issue.

(2) Was the Request to Shaw a Search?

[15] Under s. 8 of the *Charter*, "[e]veryone has the right to be secure against unreasonable search or seizure." This Court has long emphasized the need for a purposive approach to s. 8 that emphasizes the protection of privacy as a prerequisite

to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 156-57; *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28; *R. v. Plant*, [1993] 3 S.C.R. 281, at pp. 292-93; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 12-16; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 22.

[16] The first issue is whether this protection against unreasonable searches and seizures was engaged here. That depends on whether what the police did to obtain the subscriber information matching the IP address was a search or seizure within the meaning of s. 8 of the *Charter*. The answer to this question turns on whether, in the totality of the circumstances, Mr. Spencer had a reasonable expectation of privacy in the information provided to the police by Shaw. If he did, then obtaining that information was a search.

[17] We assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests: see, e.g., *Tessling*, at para. 38; *Ward*, at para. 65. The fact that these considerations must be looked at in the “totality of the circumstances” underlines the point that they are often interrelated, that they must be adapted to the circumstances of the particular case and that they must be looked at as a whole.

[18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: *Tessling*, at para. 32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40. However, this is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: *Tessling*, at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": *Patrick*, at para. 14; see also *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, and *Ward*, at paras. 81-85.

[19] I can deal quite briefly with two aspects of the appeal. The trial judge in this case held that there was no subjective expectation of privacy in this case: 2009 SKQB 341, 361 Sask. R. 1, at para. 18. However, as I will explain below, the trial judge reached this conclusion by incorrectly defining the subject matter of the search. On the proper understanding of the scope of the search, Mr. Spencer's subjective expectation of privacy in his online activities can readily be inferred from his use of the network connection to transmit sensitive information: *Cole*, at para. 43. Mr. Spencer's direct interest in the subject matter of the search is equally clear. Though

he was not personally a party to the contract with the ISP, he had access to the Internet with the permission of the subscriber and his use of the Internet was by means of his own computer in his own place of residence.

[20] The main dispute in this case thus turns on the subject matter of the search and whether Mr. Spencer's subjective expectation of privacy was reasonable. The two circumstances relevant to determining the reasonableness of his expectation of privacy in this case are the nature of the privacy interest at stake and the statutory and contractual framework governing the ISP's disclosure of subscriber information.

[21] In this case, I have found it helpful to look first at the subject matter of the search, then at the nature of the privacy interests implicated by the state actions and then finally at the governing contractual and statutory framework. While these subjects are obviously interrelated, approaching the analysis under these broad headings provides a degree of focus while permitting full examination of the "totality of the circumstances".

(a) *The Subject Matter of the Search*

[22] Mr. Spencer alleges that the police request to Shaw is a state action that constitutes a search or seizure for the purposes of s. 8 of the *Charter*. We must therefore consider what the subject matter of that request was in order to be able to identify the privacy interests that were engaged by it.

[23] In many cases, defining the subject matter of the police action that is alleged to be a search is straightforward. In others, however, it is not. This case falls into the latter category. The parties and the courts below have markedly divergent perspectives on this important issue, a divergence which is reflected in the jurisprudence: see, for example, the authorities reviewed in *Ward*, at para. 3.

[24] Mr. Spencer contends that the subject matter of the alleged search was core biographical data, revealing intimate and private information about the people living at the address provided by Shaw which matched the IP address. The Crown, on the other hand, maintains that the subject matter of the alleged search was simply a name, address and telephone number matching a publicly available IP address.

[25] These divergent views were reflected in the decisions of the Saskatchewan courts. The trial judge adopted the Crown's view that what the police sought and obtained was simply generic information that does not touch on the core of Mr. Spencer's biographical information. Ottenbreit J.A. in the Court of Appeal was of largely the same view. For him, the information sought by the police in this case simply established the identity of the contractual user of the IP address. The fact that this information might eventually reveal a good deal about the activity of identifiable individuals on the Internet was, for him, "neither here nor there": 2011 SKCA 144, 377 Sask. R. 280, at para. 110 (see also *R. v. Trapp*, 2011 SKCA 143, 377 Sask. R. 246, at paras. 119-24 and 134). In contrast to this approach, Caldwell J.A. (Cameron J.A. concurring on this point) held that in characterizing the subject matter of the alleged search, it is important to look beyond the "mundane" subscriber information

such as name and address (para. 22). The potential of that information to reveal intimate details of the lifestyle and personal choices of the individual must also be considered: see also *Trapp, per Cameron J.A.*, at paras. 33-37.

[26] I am in substantial agreement with Caldwell and Cameron J.J.A. on this point. While, in many cases, defining the subject matter of the search will be uncontroversial, in cases in which it is more difficult, the Court has taken a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake. The Court has looked at not only the nature of the precise information sought, but also at the nature of the information that it reveals.

[27] A number of decisions of the Court reflect this approach. I begin with *Plant*. There, the Court, dealing with informational privacy, stressed the strong claim to privacy in relation to information that is at the “biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state”: p. 293. Importantly, the Court went on to make clear that s. 8 protection is accorded not only to the information which is itself of that nature, but also to “information which tends to reveal intimate details of the lifestyle and personal choices of the individual”: *ibid.* (emphasis added).

[28] *Tessling* took the same approach, although it led to a different conclusion. The subject matter of the alleged search was held to be the heat emitted from the surface of a building. The Forward Looking Infra-Red (FLIR) imaging technique was

used to help assess the activities that transpired inside a house, but the heat emissions by themselves could not distinguish between one heat source and another. In short, the heat emanations were, on their own, meaningless because they did not permit any inferences about the precise activity giving rise to the heat: paras. 35-36. The critical question was: what inferences about activity inside the home — admittedly a highly private zone — did the FLIR images support?

[29] I turn next to *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, and the companion appeal in *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569. While the Court divided on other points, it was unanimous in holding that the dog sniff of Mr. Kang-Brown's bag constituted a search. As explained by both Deschamps and Bastarache JJ., the dog sniffing at the air in the vicinity of the bag functioned as an investigative procedure that allowed for a "strong, immediate and direct inference" about what was or was not inside the bag: Deschamps J., at paras. 174-75; Bastarache J., at para. 227. Thus, while the "information" obtained by the sniffer dog was simply the smell of the air outside the bag, the dog's reaction to it provided the police with a strong inference as to what was inside. As Binnie J. put it in *A.M.* (which concerned a dog sniff of the accused's backpack), "[b]y use of the dog, the policeman could 'see' through the concealing fabric of the backpack": para. 67.

[30] How to characterize the subject matter of an alleged search was addressed by the Court most recently in *Gomboc*. While the Court was divided on other matters, it was unanimous about the framework that must be applied in considering the subject matter of a "search". The Court considered the strength of the inference between data

derived from a digital recording ammeter (DRA) and particular activities going on in a residence in assessing whether use of the DRA constituted a search. Abella J. (Binnie and LeBel JJ. concurring) took into account “the strong and reliable inference that can be made from the patterns of electricity consumption . . . as to the presence within the home of one particular activity”: para. 81 (emphasis added). The Chief Justice and Fish J. referred to the fact that the DRA data “sheds light on private activities within the home”: para. 119. Deschamps J. (Charron, Rothstein and Cromwell JJ. concurring) spoke in terms of the extent to which the DRA data was revealing of activities in the home: para. 38.

[31] Thus, it is clear that the tendency of information sought to support inferences in relation to other personal information must be taken into account in characterizing the subject matter of the search. The correct approach was neatly summarized by Doherty J.A. in *Ward*, at para. 65. When identifying the subject matter of an alleged search, the court must not do so “narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action”: *ibid*.

[32] Applying this approach to the case at hand, I substantially agree with the conclusion reached by Cameron J.A. in *Trapp* and adopted by Caldwell J.A. in this case. The subject matter of the search was not simply a name and address of someone in a contractual relationship with Shaw. Rather, it was the identity of an Internet subscriber which corresponded to particular Internet usage. As Cameron J.A. put it, at para. 35 of *Trapp*:

To label information of this kind as mere “subscriber information” or “customer information”, or nothing but “name, address, and telephone number information”, tends to obscure its true nature. I say this because these characterizations gloss over the significance of an IP address and what such an address, once identified with a particular individual, is capable of revealing about that individual, including the individual’s online activity in the home.

[33] Here, the subject matter of the search is the identity of a subscriber whose Internet connection is linked to particular, monitored Internet activity.

(b) *Nature of the Privacy Interest Potentially Compromised by the State Action*

[34] The nature of the privacy interest engaged by the state conduct is another facet of the totality of the circumstances and an important factor in assessing the reasonableness of an expectation of privacy. The Court has previously emphasized an understanding of informational privacy as confidentiality and control of the use of intimate information about oneself. In my view, a somewhat broader understanding of the privacy interest at stake in this case is required to account for the role that anonymity plays in protecting privacy interests online.

[35] Privacy is admittedly a “broad and somewhat evanescent concept”: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 67. Scholars have noted the theoretical disarray of the subject and the lack of consensus apparent about its nature and limits: see, e.g., C. D. L. Hunt, “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort” (2011), 37 *Queen’s L.J.* 167, at pp. 176-77.

Notwithstanding these challenges, the Court has described three broad types of privacy interests — territorial, personal, and informational — which, while often overlapping, have proved helpful in identifying the nature of the privacy interest or interests at stake in particular situations: see, e.g., *Dyment*, at pp. 428-29; *Tessling*, at paras. 21-24. These broad descriptions of types of privacy interests are analytical tools, not strict or mutually-exclusive categories.

[36] The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. To paraphrase Binnie J. in *Patrick*, the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes: *Patrick*, at para. 32.

[37] We are concerned here primarily with informational privacy. In addition, because the computer identified and in a sense monitored by the police was in Mr. Spencer's residence, there is an element of territorial privacy in issue as well. However, in this context, the location where the activity occurs is secondary to the nature of the activity itself. Internet users do not expect their online anonymity to cease when they access the Internet outside their homes, via smartphones, or portable devices. Therefore, here as in *Patrick*, at para. 45, the fact that a home was involved

is not a controlling factor but is nonetheless part of the totality of the circumstances:
see, e.g., *Ward*, at para. 90.

[38] To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.

[39] Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician: see, e.g., *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149.

[40] Privacy also includes the related but wider notion of control over, access to and use of information, that is, "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7, cited in *Tessling*, at para. 23. La Forest J. made this point in *Dyment*. The understanding of informational privacy as control "derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (*Dyment*, at p. 429, quoting from *Privacy and Computers*, the Report of the Task Force established by the Department of Communications/Department of Justice (1972), at p. 13). Even though the information will be communicated and cannot be thought of as secret or confidential,

“situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected” (pp. 429-30); see also *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46.

[41] There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity. In my view, the concept of privacy potentially protected by s. 8 must include this understanding of privacy.

[42] The notion of privacy as anonymity is not novel. It appears in a wide array of contexts ranging from anonymous surveys to the protection of police informant identities. A person responding to a survey readily agrees to provide what may well be highly personal information. A police informant provides information about the commission of a crime. The information itself is not private — it is communicated precisely so that it will be communicated to others. But the information is communicated on the basis that it will not be identified with the person providing it. Consider situations in which the police want to obtain the list of names that correspond to the identification numbers on individual survey results or to which the defence in a criminal case wants to obtain the identity of the informant who has provided information that has been disclosed to the defence. The privacy interest at stake in these examples is not simply the individual's name, but the link between the identified individual and the personal information provided anonymously. As the intervener the Canadian Civil Liberties Association urged in its submissions,

“maintaining anonymity can be integral to ensuring privacy”: factum, at para. 7.

[43] Westin identifies anonymity as one of the basic states of privacy. Anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance: pp. 31-32; see A. Slane and L. M. Austin, “What’s In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations” (2011), 57 *Crim. L.Q.* 486, at p. 501. The Court’s decision in *R. v. Wise*, [1992] 1 S.C.R. 527, provides an example of privacy in a public place. The Court held that the ubiquitous monitoring of a vehicle’s whereabouts on public highways amounted to a violation of the suspect’s reasonable expectation of privacy. It could of course have been argued that the electronic device was simply a convenient way of keeping track of where the suspect was driving his car, something that he was doing in public for all to see. But the Court did not take that approach.

[44] La Forest J. (who, while dissenting on the issue of exclusion of the evidence under s. 24(2), concurred with respect to the existence of a reasonable expectation of privacy), explained that “[i]n a variety of public contexts, we may expect to be casually observed, but may justifiably be outraged by intensive scrutiny. In these public acts we do not expect to be personally identified and subject to extensive surveillance, but seek to merge into the ‘situational landscape’”: p. 558 (emphasis added), quoting M. Gutterman, “A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance” (1988), 39 *Syracuse L. Rev.* 647, at p. 706. The mere fact that someone

leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a person may not be able to control who observes him or her in public. Thus, in order to uphold the protection of privacy rights in some contexts, we must recognize anonymity as one conception of privacy: see E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at pp. 325-26; Westin, at p. 32; Gutterman, at p. 706.

[45] Recognizing that anonymity is one conception of informational privacy seems to me to be particularly important in the context of Internet usage. One form of anonymity, as Westin explained, is what is claimed by an individual who wants to present ideas publicly but does not want to be identified as their author: p. 32. Here, Westin, publishing in 1970, anticipates precisely one of the defining characteristics of some types of Internet communication. The communication may be accessible to millions of people but it is not identified with its author.

[46] Moreover, the Internet has exponentially increased both the quality and quantity of information that is stored about Internet users. Browsing logs, for example, may provide detailed information about users' interests. Search engines may gather records of users' search terms. Advertisers may track their users across networks of websites, gathering an overview of their interests and concerns. "Cookies" may be used to track consumer habits and may provide information about the options selected within a website, which web pages were visited before and after the visit to the host website and any other personal information provided: see N.

Gleicher, "Neither a Customer Nor a Subscriber Be: Regulating the Release of User Information on the World Wide Web" (2009), 118 *Yale L.J.* 1945, at pp. 1948-49; R. W. Hubbard, P. DeFreitas and S. Magotiaux, "The Internet — Expectations of Privacy in a New Context" (2002), 45 *Crim. L.Q.* 170, at pp. 189-91. The user cannot fully control or even necessarily be aware of who may observe a pattern of online activity, but by remaining anonymous — by guarding the link between the information and the identity of the person to whom it relates — the user can in large measure be assured that the activity remains private: see Slane and Austin, at pp. 500-3.

[47] In my view, the identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information. A sniffer dog provides information about the contents of the bag and therefore engages the privacy interests relating to its contents. DRA readings provide information about what is going on inside a home and therefore may engage the privacy interests relating to those activities. Similarly, subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating not simply to the person's name or address but to his or her identity as the source, possessor or user of that information.

[48] Doherty J.A. made this point with his usual insight and clarity in *Ward*. "Personal privacy" he wrote "protects an individual's ability to function on a day-to-day basis within society while enjoying a degree of anonymity that is essential to the

individual's personal growth and the flourishing of an open and democratic society": para. 71. He concluded that some degree of anonymity is a feature of much Internet activity and that, "[d]epending on the totality of the circumstances, . . . anonymity may enjoy constitutional protection under s. 8": para. 75. I agree. Thus, anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.

[49] The intervener the Director of Public Prosecutions raised the concern that recognizing a right to online anonymity would carve out a crime-friendly Internet landscape by impeding the effective investigation and prosecution of online crime. In light of the grave nature of the criminal wrongs that can be committed online, this concern cannot be taken lightly. However, in my view, recognizing that there *may* be a privacy interest in anonymity depending on the circumstances falls short of recognizing any "right" to anonymity and does not threaten the effectiveness of law enforcement in relation to offences committed on the Internet. In this case, for example, it seems clear that the police had ample information to obtain a production order requiring Shaw to release the subscriber information corresponding to the IP address they had obtained.

[50] Applying this framework to the facts of the present case is straightforward. In the circumstances of this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person (or a limited number of persons in the case of shared Internet services) to specific online

activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized by the Court in other circumstances as engaging significant privacy interests: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 3; *Cole*, at para. 47; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 40-45.

[51] I conclude therefore that the police request to Shaw for subscriber information corresponding to specifically observed, anonymous Internet activity engages a high level of informational privacy. I agree with Caldwell J.A.'s conclusion on this point:

... a reasonable and informed person concerned about the protection of privacy would expect one's activities on one's own computer used in one's own home would be private. . . . In my judgment, it matters not that the personal attributes of the Disclosed Information pertained to Mr. Spencer's sister because Mr. Spencer was personally and directly exposed to the consequences of the police conduct in this case. As such, the police conduct *prima facie* engaged a personal privacy right of Mr. Spencer and, in this respect, his interest in the privacy of the Disclosed Information was direct and personal. [para. 27]

(c) *Reasonable Expectation of Privacy*

[52] The next question is whether Mr. Spencer's expectation of privacy was reasonable. The trial judge found that there could be no reasonable expectation of privacy in the face of the relevant contractual and statutory provisions (para. 19), a conclusion with which Caldwell J.A. agreed on appeal: para. 42. Cameron J.A.,

however, was doubtful that the contractual and statutory terms had this effect in the context of this case: para. 98.

[53] In this Court, Mr. Spencer maintains that the contractual and statutory terms did not undermine a reasonable expectation of privacy with respect to the subscriber information. He submits that the contractual provisions do nothing more than suggest that the information will not be provided to police unless required by law and that *PIPEDA*, whose purpose is to protect privacy rights, supports rather than negates the reasonableness of an expectation of privacy in this case. The Crown disagrees and supports the position taken on this point by Caldwell J.A. in the Court of Appeal.

[54] There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy. So, for example in *Gomboc*, Deschamps J. writing for four members of the Court, found that the terms governing the relationship between the electricity provider and its customer were “highly significant” to Mr. Gomboc’s reasonable expectation of privacy, but treated it as “one factor amongst many which must be weighed in assessing the totality of the circumstances”: paras. 31-32. She also emphasized that when dealing with contracts of adhesion in the context of a consumer relationship, it was necessary to “proceed with caution” when determining the impact that such provision would have on the reasonableness of an expectation of privacy: para. 33. The need for caution in this context was pointedly underlined in the dissenting reasons of the Chief Justice and Fish J. in that case:

paras. 138-42.

[55] The contractual and statutory frameworks overlap in the present case because the Shaw Joint Terms of Service make reference to *PIPEDA*, and the scope of permitted disclosure under *PIPEDA* turns partly on whether the customer has consented to the disclosure of personal information. I must first set out the details of these schemes before turning to their impact on the reasonable expectations analysis. In doing so, it becomes apparent that the relevant provisions provide little assistance in evaluating the reasonableness of Mr. Spencer's expectation of privacy.

[56] Shaw provides Internet services to its customers under a standard form "Joint Terms of Service" agreement. Additional terms and conditions are provided in Shaw's "Acceptable Use Policy" and its "Privacy Policy". The terms of these agreements are posted online on Shaw's website and change from time to time. The investigators sought the subscriber information for the IP address used on August 31, 2007 in their request to Shaw.

[57] Mr. Spencer was not personally a party to these agreements, as he accessed the Internet through his sister's subscription. It is common practice for multiple users to share a common Internet connection. A reasonable user would be aware that the use of the service would be governed by certain terms and conditions, and those terms and conditions were readily accessible through Shaw's website. This case does not require us to decide whether Mr. Spencer was bound by the terms of the contract with Shaw. Quite apart from contractual liability, the terms on which he

gained access to the Internet are a relevant circumstance in assessing the reasonableness of his expectation of privacy. There are three relevant sets of provisions which, taken as a whole, provide a confusing and unclear picture of what Shaw would do when faced with a police request for subscriber information. The Joint Terms of Service at first blush appear to permit broad disclosure because they provide, among other things, that "Shaw may disclose any information as is necessary to . . . satisfy any legal, regulatory or other governmental request". This general provision, however, must be read in light of the more specific provision relating to disclosure of IP addresses and other identifying information in the context of criminal investigations contained in the Acceptable Use Policy, which in turn is subject to the Privacy Policy.

[58] The Acceptable Use Policy (last updated on June 18, 2007) provides that Shaw is authorized to cooperate with law enforcement authorities in the investigation of criminal violations, including supplying information identifying a subscriber *in accordance with its Privacy Policy*. The provision reads as follows:

You hereby authorize Shaw to cooperate with (i) law enforcement authorities in the investigation of suspected criminal violations, and/or (ii) system administrators at other Internet service providers or other network or computing facilities in order to enforce this Agreement. Such cooperation may include Shaw providing the username, IP address, or other identifying information about a subscriber, in accordance with the guidelines set out in Shaw's Privacy Policy. [Emphasis added.]

[59] The Privacy Policy in the record (last updated on November 12, 2008) states that Shaw is committed to protecting personal information, which is defined as

information about an identifiable individual. One of the ten principles set out in the Privacy Policy deals with limiting the disclosure of personal information (principle 5). The policy limits the circumstances under which personal information will be disclosed without the customer's knowledge or consent to "exceptional circumstances, as permitted by law". Shaw may disclose information to its partners in order to provide its services and, in such cases, the information is governed by "strict confidentiality standards and policies" to keep the information secure and to ensure it is treated in accordance with *PIPEDA*. The Privacy Policy also provides that "Shaw may disclose Customer's Personal Information to: . . . a third party or parties, where the Customer has given Shaw Consent to such disclosure or if disclosure is required by law, in accordance with *The Personal Information Protection and Electronic Documents Act*" (emphasis added).

[60] Whether or not disclosure of personal information by Shaw is "permitted" or "required by law" in turn depends on an analysis of the applicable statutory framework. The contractual provisions, read as a whole, are confusing and equivocal in terms of their impact on a user's reasonable expectation of privacy in relation to police initiated requests for subscriber information. The statutory framework provided by *PIPEDA* is not much more illuminating.

[61] Shaw's collection, use, and disclosure of the personal information of its subscribers is subject to *PIPEDA*, which protects personal information held by organizations engaged in commercial activities from being disclosed without the knowledge or consent of the person to whom the information relates: Sch. 1, clause

4.3. Section 7 contains several exceptions to this general rule and permits organizations to disclose personal information without consent. The exception relied on in this case is s. 7(3)(c.1)(ii). It permits disclosure to a government institution that has requested the disclosure for the purpose of law enforcement and has stated its “lawful authority” for the request. The provisions of *PIPEDA* are not of much help in determining whether there is a reasonable expectation of privacy in this case. They lead us in a circle.

[62] Section 7(3)(c.1)(ii) allows for disclosure without consent to a government institution where that institution has identified its *lawful authority* to obtain the information. But the issue is whether there was such lawful authority which in turn depends in part on whether there was a reasonable expectation of privacy with respect to the subscriber information. *PIPEDA* thus cannot be used as a factor to weigh against the existence of a reasonable expectation of privacy since the proper interpretation of the relevant provision itself depends on whether such a reasonable expectation of privacy exists. Given that the purpose of *PIPEDA* is to establish rules governing, among other things, disclosure “of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information” (s. 3), it would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat *PIPEDA*’s general prohibition on the disclosure of personal information without consent.

[63] I am aware that I have reached a different result from that reached in

similar circumstances by the Ontario Court of Appeal in *Ward*, where the court held that the provisions of *PIPEDA* were a factor which weighed against finding a reasonable expectation of privacy in subscriber information. This conclusion was based on two main considerations. The first was that an ISP has a legitimate interest in assisting in law enforcement relating to crimes committed using its services: para. 99. The second was the grave nature of child pornography offences, which made it reasonable to expect that an ISP would cooperate with a police investigation: paras. 102-3. While these considerations are certainly relevant from a policy perspective, they cannot override the clear statutory language of s. 7(3)(c.1)(ii) of *PIPEDA*, which permits disclosure only if a request is made by a government institution with “lawful authority” to request the disclosure. It is reasonable to expect that an organization bound by *PIPEDA* will respect its statutory obligations with respect to personal information. The Court of Appeal in *Ward* held that s. 7(3)(c.1)(ii) must be read in light of s. 5(3), which states that “[a]n organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances”. This rule of “reasonable disclosure” was used as a basis to invoke considerations such as allowing ISPs to cooperate with the police and preventing serious crimes in the interpretation of *PIPEDA*. Section 5(3) is a guiding principle that underpins the interpretation of the various provisions of *PIPEDA*. It does not allow for a departure from the clear requirement that a requesting government institution possess “lawful authority” and so does not resolve the essential circularity of using s. 7(3)(c.1)(ii) as a factor in determining whether a reasonable expectation of privacy exists.

[64] I also note with respect to an ISP's legitimate interest in preventing crimes committed through its services that entirely different considerations may apply where an ISP itself detects illegal activity and of its own motion wishes to report this activity to the police. Such a situation falls under a separate, broader exemption in *PIPEDA*, namely s. 7(3)(d). The investigation in this case was begun as a police investigation and the disclosure of the subscriber information arose out of the request letter sent by the police to Shaw.

[65] The overall impression created by these terms is that disclosure at the request of the police would be made only where required or permitted by law. Such disclosure is only permitted by *PIPEDA* in accordance with the exception in s. 7, which in this case would require the requesting police to have "lawful authority" to request the disclosure. For reasons that I will set out in the next section, this request had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. I conclude that, if anything, the contractual provisions in this case support the existence of a reasonable expectation of privacy, since the Privacy Policy narrowly circumscribes Shaw's right to disclose the personal information of subscribers.

[66] In my view, in the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose

such information amounts to a search.

[67] The intervener the Attorney General of Alberta raised a concern that if the police were not permitted to request disclosure of subscriber information, then other routine inquiries that might reveal sensitive information about a suspect would also be prohibited, and this would unduly impede the investigation of crimes. For example, when the police interview the victim of a crime, core biographical details of a suspect's lifestyle might be revealed. I do not agree that this result follows from the principles set out in these reasons. Where a police officer requests disclosure of information relating to a suspect from a third party, whether there is a search depends on whether, in light of the totality of the circumstances, the suspect has a reasonable expectation of privacy in that information: *Plant*, at p. 293; *Gomboc*, at paras. 27-30, *per Deschamps J.* In *Duarte*, the Court distinguished between a person repeating a conversation with a suspect to the police and the police procuring an audio recording of the same conversation. The Court held that the danger is "not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words": at pp. 43-44. Similarly in this case, the police request that the ISP disclose the subscriber information was in effect a request to link Mr. Spencer with precise online activity that had been the subject of monitoring by the police and thus engaged a more significant privacy interest than a simple question posed by the police in the course of an investigation.

B. *Was the Search Lawful?*

[68] A warrantless search, such as the one that occurred in this case, is presumptively unreasonable: *R. v. Collins*, [1987] 1 S.C.R. 265. The Crown bears the burden of rebutting this presumption. A search will be reasonable if (a) it was authorized by law, (b) the law itself was reasonable, and (c) the search was carried out in a reasonable manner: p. 278. Mr. Spencer has not challenged the constitutionality of the laws that purportedly authorized the search. He did raise concerns about the reasonableness of the manner, but in my view, these are groundless. Accordingly, we need only consider whether the search was authorized by law.

[69] The Crown supports the conclusions of Caldwell and Cameron J.J.A. in the Court of Appeal that any search was lawful, relying on the combined effect of s. 487.014 of the *Criminal Code* and s. 7(3)(c.1)(ii) of *PIPEDA*. I respectfully do not agree.

[70] Section 487.014(1) of the *Criminal Code* provides that a peace officer does not need a production order “to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing”. *PIPEDA* prohibits disclosure of the information unless the requirements of the law enforcement provision are met, including that the government institution discloses a lawful authority *to obtain*, not simply to ask for the information: s. 7(3)(c.1)(ii). On the Crown’s reading of these provisions, *PIPEDA*’s protections become virtually meaningless in the face of a police request for personal information: the “lawful authority” is a simple request without power to compel and, because there

was a simple request, the institution is no longer prohibited by law from disclosing the information.

[71] “Lawful authority” in s. 7(3)(c.1)(ii) of *PIPEDA* must be contrasted with s. 7(3)(c), which provides that personal information may be disclosed without consent where “required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records”. The reference to “lawful authority” in s. 7(3)(c.1)(ii) must mean something other than a “subpoena or [search] warrant”. “Lawful authority” may include several things. It may refer to the common law authority of the police to ask questions relating to matters that are not subject to a reasonable expectation of privacy. It may refer to the authority of police to conduct warrantless searches under exigent circumstances or where authorized by a reasonable law: *Collins*. As the intervener the Privacy Commissioner of Canada submitted, interpreting “lawful authority” as requiring more than a bare request by law enforcement gives this term a meaningful role to play in the context of s. 7(3) and should be preferred over alternative meanings that do not do so. In short, I agree with the Ontario Court of Appeal in *Ward* on this point that neither s. 487.014(1) of the *Criminal Code*, nor *PIPEDA* creates any police search and seizure powers: para. 46.

[72] I recognize that this conclusion differs from that of the Saskatchewan Court of Appeal in *Trapp*, at para. 66, and the British Columbia Supreme Court in *R. v. McNeice*, 2010 BCSC 1544 (CanLII), at para. 43. The Court of Appeal in *Trapp* read s. 487.014(1) together with s. 29(2)(g) of *The Freedom of Information and*

Protection of Privacy Act, S.S. 1990-91, c. F-22.01, an analogous provision to s. 7(3)(c.1)(ii) of *PIPEDA*, although one from which the "lawful authority" requirement is absent. The court held that s. 487.014(1) gave the police a power to make any inquiries that were not otherwise prohibited by law. The court in *McNeice* took the same approach, although that case concerned s. 7(3)(c.1)(ii) of *PIPEDA*, the same provision at issue in this case.

[73] With respect, I cannot accept that this conclusion applies to s. 7(3)(c.1)(ii) of *PIPEDA*. Section 487.014(1) is a declaratory provision that confirms the existing common law powers of police officers to make enquiries, as indicated by the fact that the section begins with the phrase "[f]or greater certainty": see *Ward*, at para. 49. *PIPEDA* is a statute whose purpose, as set out in s. 3, is to increase the protection of personal information. Since in the circumstances of this case the police do not have the power to conduct a search for subscriber information in the absence of exigent circumstances or a reasonable law, I do not see how they could gain a new search power through the combination of a declaratory provision and a provision enacted to promote the protection of personal information.

[74] The subscriber information obtained by police was used in support of the Information to Obtain which led to the issuance of a warrant to search Ms. Spencer's residence. Without that information, the warrant could not have been obtained. It follows that if that information is excluded from consideration as it must be because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant, and the search of the residence was therefore unlawful. I

conclude, therefore, that the conduct of the search of Ms. Spencer's residence violated the *Charter*: *Plant*, at p. 296; *Hunter v. Southam*, at p. 161. Nothing in these reasons addresses or diminishes any existing powers of the police to obtain subscriber information in exigent circumstances such as, for example, where the information is required to prevent imminent bodily harm. There were no such circumstances here.

C. *Should the Evidence Have Been Excluded*

[75] Neither the trial judge nor the Court of Appeal found a breach of s. 8 in this case and, therefore, did not have to consider the question of whether the evidence obtained in a manner that violated Mr. Spencer's *Charter* rights should be excluded under s. 24(2) of the *Charter*: The question is whether the admission of the evidence would bring the administration of justice into disrepute. I accept, as both Mr. Spencer and the Crown agree, that we can determine this issue on the record before us. However, I disagree with Mr. Spencer's submission that the evidence should be excluded. In my view, it should not.

[76] The test for applying s. 24(2) is set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. The court must "assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct . . . , (2) the impact of the breach on the *Charter*-protected interests of the accused . . . , and (3) society's interest in the adjudication of the case on its merits": para. 71.

[77] Turning first to the seriousness of the state conduct, my view is that it cannot be characterized as constituting either “[w]ilful or flagrant disregard of the *Charter*”: *Grant*, at para. 75. Det. Sgt. Parisien testified that he believed the request to Shaw was authorized by law and that Shaw could consent to provide the information to him. He also testified, however, that he was aware that there were decisions both ways on the issue of whether this was a legally acceptable practice. While I would not want to be understood to be encouraging the police to act without warrants in “gray areas”, in light of the fact that the trial judge and three judges of the Court of Appeal concluded that Det. Sgt. Parisien had acted lawfully, his belief was clearly reasonable. In short, the police were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. There is no challenge to any other aspect of the information to obtain the search warrant. The nature of the police conduct in this case would not tend to bring the administration of justice into disrepute.

[78] The second *Grant* factor is the impact of the *Charter*-infringing conduct on Mr. Spencer’s *Charter*-protected interests. That impact here was serious. As discussed above, anonymity is an important safeguard for privacy interests online. The violation of that anonymity exposed personal choices made by Mr. Spencer to be his own and subjected them to police scrutiny as such. This weighs in favour of excluding the evidence.

[79] That brings me to the final factor, society’s interest in an adjudication on the merits. As explained in *Grant*,

while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high. [para. 84]

[80] The offences here are serious and carry minimum prison sentences. Society has both a strong interest in the adjudication of the case and also in ensuring that the justice system remains above reproach in its treatment of those charged with these serious offences. If the evidence is excluded, the Crown will effectively have no case. The impugned evidence (the electronic files containing child pornography) is reliable and was admitted by the defence at trial to constitute child pornography. Society undoubtedly has an interest in seeing a full and fair trial based on reliable evidence, and all the more so for a crime which implicates the safety of children.

[81] Balancing the three factors, my view is that exclusion of the evidence rather than its admission would bring the administration of justice into disrepute, and I would uphold its admission.

D. The Fault Element of the "Making Available" Offence

[82] The Court of Appeal ordered a new trial on the "making available" count on the basis that the trial judge had erred in his analysis of the fault requirement for the offence. It found that the trial judge had erred by finding that the making available offence required that Mr. Spencer knew that some positive act on his part facilitated access by others to the pornography. This error, in the Court of Appeal's view, led the judge to fail to consider whether Mr. Spencer had been wilfully blind to the fact that

the pornography was being made available to others through the shared folder. I respectfully agree with the Court of Appeal on both points and would affirm the order for a new trial.

[83] There is no dispute that the accused in a prosecution under s. 163.1(3) of the *Criminal Code* must be proved to have had knowledge that the pornographic material was being made available. This does not require, however, as the trial judge suggested, that the accused must knowingly, by some positive act, facilitate the availability of the material. I accept Caldwell J.A.'s conclusion that the offence is complete once the accused knowingly makes pornography available to others. As he put it,

[i]n the context of a file sharing program, the *mens rea* element of making available child pornography under s. 163.1(3) requires proof of the intent to make computer files containing child pornography available to others using that program or actual knowledge that the file sharing program makes files available to others. [para. 87]

While the trial judge's reasons may perhaps be open to more than one interpretation on this point, reading his reasons as a whole, I also agree with Caldwell J.A. that the trial judge erred in deciding that a positive act was required to satisfy the *mens rea* component of the making available offence: para. 81.

[84] I further agree with Caldwell J.A. that wilful blindness was a live issue on the evidence and that it was because of the trial judge's error in relation to positive facilitation that he did not turn his mind to the evidence that could support an

inference of wilful blindness. Wilful blindness is a substitute for knowledge. As explained by Charron J. in *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21,

[w]ilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), “[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?” [Emphasis added.]

[85] The evidence calling for consideration of wilful blindness included, for example, evidence that in Mr. Spencer’s statement to police he acknowledged the following: that LimeWire is a file-sharing program; that he had changed at least one default setting in LimeWire; that when LimeWire is first installed on a computer, it displays information notifying the user that it is a file-sharing program; that at the start of each session, LimeWire notifies the user that it is a file-sharing program and warns of the ramifications of file-sharing; and that LimeWire contains built-in visual indicators that show the progress of the uploading of files by others from the user’s computer: paras. 88-89.

[86] Given that wilful blindness was a live issue and that the trial judge’s error in holding that a positive act was required to meet the *mens rea* component of the making available offence resulted in his not considering the wilful blindness issue, I

agree with Caldwell J.A. that the error could reasonably be thought to have had a bearing on his decision to acquit: para. 93; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

III. Disposition

[87] I would dismiss the appeal, affirm the conviction on the possession count and uphold the Court of Appeal's order for a new trial on the making available count.

APPENDIX

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

7. ...

(3) [Disclosure without knowledge or consent] For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

...

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

...

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or

gathering intelligence for the purpose of enforcing any such law, or

...

(d) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or

(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

Criminal Code, R.S.C. 1985, c. C-46

163.1 ...

(3) [Distribution, etc. of child pornography] Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

...

487.014 (1) [Power of peace officer] For greater certainty, no production order is necessary for a peace officer or public officer enforcing or administering this or any other Act of Parliament to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing.

785-

Appeal dismissed.

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**ADVANCE UNEDITED
VERSION**

Distr.: General
8 March 2016

Original: English

Human Rights Council

Thirty-first session

Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

**Report of the Special Rapporteur on the right to privacy,
Joseph A. Cannataci***

Note by the Secretariat

In the present report, submitted to the Human Rights Council pursuant to Council resolution 28/16, the Special Rapporteur on the right to privacy describes his vision for the mandate, his working methods and provides an insight into the state of privacy at the beginning of 2016 and a work plan for the first three years of the mandate

* Late submission

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I. Introduction

1. The Human Rights Council established the mandate of the Special Rapporteur on privacy (SRP) in its resolution 28/16 (“The right to privacy in the digital age”). In the resolution the Council emphasizes that Human Rights need to be protected under all circumstances, at all times and in all environments. To achieve this is particularly challenging when it comes to the right to privacy. The rapid development of information technology provides not only new opportunities for social interaction but also raises concerns on how to develop the right further in order to face new challenges.

2. Pursuant to Human Rights Council resolution 28/16, the Special Rapporteur will report annually to the Council and to the General Assembly. In the present report, the Special Rapporteur describes the mandate’s working methods (Section II), the state of privacy in the year 2016 (Section III.), reports the highlight activities in carrying out the mandate up to this moment in time (Section IV.) and proposes a ten point plan which aims at discovering and further developing the new shape of the right to privacy in the 21st century (Section V.). Finally, the Special Rapporteur presents his conclusions (Section VI.).

3. The aims and objectives of this report must perforce be very modest. This first report should be understood as being a very preliminary one and should be taken in context: it is being prepared scarcely six months from the beginning of the mandate’s activities which commenced on 1st August 2015. As such, this initial six month period (most of the report was originally drafted by mid-January 2016) has not been sufficient to meet and consult in-depth with a satisfactorily wide spectrum of stakeholders although considerable effort has been invested in doing so with a significant amount of success. The primary aim of this report therefore is to reflect a period where it has been possible to identify a number of issues but not necessarily to definitively prioritise them. It is expected that the Special Rapporteur would be in a much better position to continue an on-going process of properly prioritising action required on issues some time during the next 6-12 months (January 2016-January 2017) after having had the opportunity to meet with and listen to the concerns of many more stakeholders all around the world. Some more reflections about the vision and the challenges facing the SRP are outlined in Annex I.

II. Working methods of the mandate

4. The SRP immediately set about building up the SRP team composed of persons working for the mandate on a part-time or full-time basis. One of these persons is currently a full-time United Nations (UN) Human rights officer, hired on a temporary contract, while the position is under recruitment. The work of this person is supervised by a more senior UN employee who is also responsible for supporting the work of six other mandate holders. A second part time professional and a part time administrative officer will soon be recruited, as well as a part-time consultant. The SRP is grateful that the Human Rights Council endowed his mandate with this still limited (given the scope of his mandate) but unprecedented level of support to a mandate holder. The other persons in the SRP team are not employed by the UN but are resourced by extra-mural funding obtained by the SRP or may be volunteers.² The team is often physically spread across at least three geographical locations (currently Malta, the Netherlands and Switzerland) and, as befits the digital age,

² The SRP is currently in negotiations with both NGOs and Data Protection Agencies which may be willing to second domain-specialists or other staff or otherwise provide resources to assist in the large quantity of complex work required by the mandate. It is expected that these negotiations will later expand to include UN member states and corporations who would likewise be willing to contribute additional resources to provide the capacity and ensure sustainability of work on privacy protection.

most of the team meetings are carried out in cyber-space with the working day being opened by an on-line conference call involving all team-members who may be available. During the "morning meeting" team members typically report on work carried out in the previous day, consult about tasks planned for the rest of the working day and plan tasks and events for the following weeks and months. When doing so, their tasks reflect the fact that the work of the SRP may be broadly divided into four categories and any team member may be working concurrently on tasks from each of these categories:

1. Country monitoring

5. A database of current policies, legislation, procedures and practices is being developed and populated with documents containing a variety of reports as well as copies of legislation. This database will enable the SRP to identify issues of concern, as well as best practices which could then be shared with others.

2. Thematic studies: analysis and assessment

6. In a world which benefits greatly from *an Internet without borders*, the SRP's consultations indicate widespread support for a general principle of

- *Safeguards without borders*
- *Remedies across borders*

7. This concern with safeguards aimed at protecting privacy and remedies for privacy breaches underpins each of the following thematic study commenced by the SRP mandate in a number of sectors where risks to privacy appear high, and each of which is expected to eventually lead to an ad hoc report being produced reflecting an on-going process of consultations, interactions and observations:

(a) Privacy and Personality across cultures

8. This study responds to the crying need identified of achieving a better understanding of what privacy is or should be across cultures in 2016 in a way which makes the understanding of the right more relevant to a digital age where the internet operates without borders. In asking the question "Why privacy?" and positing privacy as an enabling right as opposed to being an end in itself, the SRP is pursuing an analysis of privacy as an essential right which enables the achievement of an over-arching fundamental right to the free, unhindered development of one's personality. This analysis is being carried out in close co-operation with several NGOs and is expected to be the focus of a major international conference which will be organised in 2016. This analysis of privacy is being carried out in a wider context and one where its intersection with other fundamental rights is also being examined. Thus the relationship of privacy with freedom of expression and freedom to access publicly-held information is expected to be examined *inter alia* also through joint action with other UN Special Rapporteurs and discussions are already underway with the Special Rapporteur for Freedom of Expression in order to explore opportunities for joint action about this matter during 2016-2017.

(b) Corporate on-line business models and personal data use

9. The first 25 years of the existence of the world-wide web have led to a largely unregulated organic growth of private corporations which have sometimes mushroomed into multinational entities operating across national borders and attracting customers from all across the world. One of the hallmarks of this growth has been the collection and use of all forms of personal data: every search, every read, every e-mail or other form of messaging, every product or service purchased leaves hundreds of thousands of electronic tracks about an individual which are capable of being aggregated into forming a very

accurate profile of that individual's likes, dislikes, moods, financial capabilities, sexual preferences, medical condition, shopping patterns as well as the intellectual, political, religious and philosophical interests and sometimes even the relevant opinions of the netizen. In general, it should be questioned whether the offering of certain online services by certain service providers has to result necessarily in the tracking of the individual's behaviour to ensure just compensation. This increasingly detailed data-map of consumer behaviour has resulted in personal data becoming a commodity where access to such data or exploitation of such data in a variety of ways is now one of the world's largest industries generating revenues calculated in hundreds of billions most usually in the form of targeted advertising. Very often it would seem that while consumers may be aware of the user-generated content that they themselves consciously put on-line they are much less aware of the quantity, the quality and the specific uses of the metadata they generate when surfing, chatting, shopping and otherwise interacting on-line. The data available for the profiling of individuals is now in order of magnitude larger than it was in 1991-1992 and the extent of the risks for privacy associated with the use or mis-use of that data are not yet completely understood. There is some evidence that the commodification of personal data, especially in sectors traditionally considered to be sensitive such as that of medical and health data, has increased to an extent where the private individual is neither conscious nor consenting to the sale or multiple re-sales of his or her data. There is also not enough evidence available to properly assess the risk inherent in purportedly anonymised data which can be reverse-engineered in a way such to be linked to an identified or identifiable individual. Such a breach of privacy could potentially pose multiple risks to the individual citizen as well as to the community concerned especially if the access is unauthorised and carried out by state authorities intent on acquiring or retaining power, organised crime, commercial corporations acting illegitimately etc. In the early days of digital computers, one of the main concerns was the use of personal data by the state and the state's abilities to correlate data held in various sources to form a detailed picture of an individual's activities and assets. In 2016 it would seem that much more data is held on the individual by corporations than that held by the state. The vast revenues derived from the monetisation of personal data to the extent that it has become a marketable and tradable commodity mean that the incentive for changing the business model simply on account of privacy concerns is not very high. Indeed, it was only when recently risks to privacy threatened the income potential of the business model that some corporations took a stricter more privacy-friendly approach. It would seem opportune that a proper international discussion be held, informed by the collection of an appropriate evidence-base, in order to determine what type of information policy is most suitable to an approach which would maximise protection of and minimise risk to privacy of individual citizens in relation to the data collected about them by corporations. This discussion would be informed about the notions and expectations of privacy that citizens indicate and illustrate in the course of paragraph 8. It is expected that preliminary consultations commenced in 2015, would continue with on-line corporations throughout 2016 with a major public consultation event on this theme being planned for 2017.

(c) *Security, surveillance, proportionality and cyberpeace*

10. International concern with security remained at the forefront of developments throughout 2015-2016. The country monitoring process outlined in paragraph 8 above revealed several examples of legislation being rushed through national parliaments in an effort to legitimise the use of certain privacy-intrusive measures by security & intelligence services (SIS) and law enforcement agencies (LEAs) in those particular states. In many of these countries, though unfortunately not all, these legislative measures resulted in public debate about:

- (i) the adequacy of oversight mechanisms;

- (ii) the distinction between targeted surveillance and mass surveillance (or bulk surveillance as it is euphemistically called in some countries);
- (iii) the proportionality of such measures in a democratic society;
- (iv) the cost-effectiveness and the overall efficacy of such measures.

11. Countering terrorism and organised crime as well as other socially-sensitive offences such as paedophilia are the main declared aims of such legislation. Conflicting evidence has been given in these debates, often suggesting that privacy-intrusive measures and especially mass-surveillance will not result in greater security and that intelligence failures need to be addressed by other means. The SRP has continued a programme of continuous engagement with law enforcement agencies and security and intelligence services world-wide in an effort to better understand their legitimate concerns and recognise best practices which could be usefully shared as well as to identify policies, practices and legislation of doubtful usefulness or which present an unacceptable level of risk to privacy nationally and world-wide. In some instances this on-going analysis and assessment becomes almost inextricably entwined with issues of cyber-security and cyber-espionage where a small but growing number of states treat cyber-space as being yet another theatre of operations for a multitude of their security and intelligence agencies and appear as yet unwilling to engage with each other – and sometimes with the SRP – on these issues which not unnaturally also directly impact the privacy of citizens irrespective of their nationality. While not necessarily the primary target of cyber-security and cyber-espionage measures, the ordinary citizen may often get caught in the cross-fire and his or her personal data and on-line activities may end up being monitored in the name of national security in a way which is unnecessary, disproportionate and excessive. Apart from ad hoc investigatory work carried out for the mandate, the SRP is fortunate in having access to a rich evidence-base provided by previous and on-going independent collaborative research in the security field, especially that funded by the European Union³ which may be used to the benefit of all nations. The SRP is pursuing this exploration/study on four main fronts: a) State surveillance capabilities which are proportionate in scope and adequately constrained by legislative, procedural and technical safeguards including strong oversight mechanisms; b) a focus on targeted as opposed to mass surveillance; c) the access of LEAs and SIS to personal data held by private corporations and other non-public entities; d) a renewed emphasis on Cyberpeace. The SRP is firmly of the opinion that Cyberspace risks being ruined by Cyberwar and Cyber-surveillance and that Governments and other stakeholders should work towards Cyberpeace. In this sense at least, privacy protection is also part of the Cyberpeace movement. In this way, Cyberspace can truly become a digital space where the citizen can expect both privacy and security, a peaceful space which is not constantly being put in jeopardy by the activities of some States over and above the threats posed by terrorists and organised crime.

(d) *Open data and Big Data analytics: the impact on privacy*

12. One of the most important issues in information policy and governance in the second decade of the twenty-first century deals with determining the *medio stat virtus* between, on the one hand, use of data for the benefit of society under the principles of Open Data and, on the other hand, the established principles we have developed to date with a view to protecting fundamental rights like privacy, autonomy and the free development of one's personality. A more detailed insight into the SRP's concerns in this area is available in Annex II.

³ Including projects such as CONSENT, SMART, RESPECT, SiiP, INGRESS, E-CRIME, EVIDENCE, MAPPING, CITYCoP, CARISMAND

(e) *Genetics and privacy*

13. The SRP notes that approximately 25% of the UN's member states, have implemented national criminal offender DNA (DeoxyriboNucleic Acid) database programs. Forensic DNA databases can play an important role in solving crimes but they also raise human rights concerns. Issues include potential misuse for government surveillance, including identification of relatives and non-paternity, and the risk of miscarriages of justice. Furthermore it would appear that the use of DNA database in civilian uses, such as for ID cards and immigration is set to increase exponentially and, within the next few years, it is likely that we will see the first country move forward with a citizen-wide DNA database. In a revival of concerns raised in the 1990s about the use of genetic data in the insurance industry, it is being suggested that personalized medicine will cause many citizens to voluntarily submit their full human genomes to the health care industry. In the wake of these and other concerns, there is an ongoing need for greater public and policy debate as DNA databases expand around the world. The SRP intends to continue to engage with projects which aim to set international human rights standards for DNA databases, by establishing best practice and involving experts, policy makers and members of the public in open debate. It is expected that this engagement would contribute to best practice guidelines developed with civil society input, for feedback and discussion.

(f) *Privacy, dignity and reputation*

14. The concern with security and surveillance has possibly been one of the factors deflecting attention from the concern expressed and shared by many citizens about the way that their privacy, their dignity and their reputation are being put at risk on the internet. The digital age has meant that media has developed and changed over the past two decades and this especially in the way that the Internet has enabled normal citizens who do not have the benefit of a formal education in journalism to publish text, audio and video at will at any time of day. This development has empowered citizens in many ways especially in situations where censorship or other obstacles are bypassed and the technology facilitates freedom of expression in a way which benefits democratic aspects of society. On the other hand this new phenomenon of citizen-journalists and bloggers in a fast-moving media world taken together with widespread use of social media has led to a widespread concern that the right to freedom of expression is being abused with a negative impact on other fundamental human rights such as privacy and dignity. Contemporary research over the past five years has highlighted ever-increasing concern of citizens with the ease with which their good name and reputation may be attacked and destroyed on the Internet as well as the sense of helplessness that is felt by many netizens when seeking safeguards and remedies in cases of defamation and/or breach of privacy. The SRP would like to collaborate with the UN Special Rapporteur for Freedom of Expression, civil society as well as other UN agencies like UNESCO with a view to exploring concrete safeguards and remedies for privacy, dignity and reputation on the internet. As with a number of the other thematic studies outlined above, the relationship between Privacy and Internet Governance remains one of the underlying constant issues which are also relevant to privacy, dignity and reputation.

(g) *Biometrics and privacy*

15. A survey of current research suggests a huge surge in interest in using all forms of biometrics for a variety of purposes ranging from law enforcement to personal access to mobile devices. Thus voice and speaker identification, retina scans, gait recognition, face recognition, fingerprint and sub-cutaneous fingerprint technology are just some examples of the many digital technologies being developed and deployed for various purposes across society in the second decade of the 21st century. The SRP intends to continue long-standing engagement with the biometric research community as well as LEAs, SIS and civil society

in an attempt at further identifying appropriate safeguards and remedies in the case of usage of biometric devices.

3. Individual complaints

16. Every so often, and as the mandate will become known, the SRP has received and will presumably continue to receive complaints from individual members of the public residing in a given national territory or from civil society actors of alleged infringements of privacy rights. These complaints are and will be followed up through correspondence with the sources of the complaints and the relevant governments authorities, through the usual communications methodology of Special Procedures mandate holders aimed at clarifying the allegations made, establishing facts and, where necessary, make recommendations for corrective action. These communications may also involve on-line and in-person meetings as appropriate. They will be reported to the Council in the annual reports of the SRP. Should the evidence received warrant particular or urgent attention, and communications prove not to be the appropriate way of responding, the SRP may consider issuing a public expression of concern.

4. Joint actions

17. The SRP receives regularly requests for and may sometimes initiate joint actions with other Special Rapporteurs. Details about these are published separately in the Communications Report of Special Procedures.

18. As at 05 March 2016, there has not been the time or the opportunity to collect enough evidence in any of the four categories listed above to do much beyond adhering to two joint actions. It is expected however that information collected in the four categories above will combine to provide the evidence-base required to pursue SRP dialogue and cooperation with relevant states, including through communications, country visits and other modes of collaboration.

5. Building Bridges and a policy of engagement

19. The SRP has used the mandate to continue and expand previous work aimed at building bridges with and between stakeholders. This leads to an on-going policy of engagement with all classes of stakeholders, including officials and ministers of various governments in their capitals or at bilateral meetings in international fora; meetings with several Data Protection and Privacy Commissioners and especially with the Chairperson of the Art 29 Committee of the EU and the Chairperson of the Council of Europe's Consultative Committee on Data Protection (T-PD); discussions with technical standards bodies such as the ITU and IEEE; in-depth meetings with civil society either one-to-one or in groups; one-to-one meetings with Human rights specialists or other officials from the Permanent Missions of States to the UN in Geneva, etc. etc. Invitations to deliver keynote speeches, participate in panel discussions, conferences and to meet with members of civil society are received almost literally on a daily basis. Many are accepted, especially those in line with the seven thematic studies indicated in Section II paras 6 to 15 above while several others are regretfully declined especially where time and/or budgetary constraints make such participation unfeasible. Amongst many other results, this policy of engagement has also witnessed the adoption of a Resolution on Cooperation with the UN Special Rapporteur for Privacy⁴ adopted in October 2015 by the International Conference of Data Protection and Privacy Commissioners.

⁴ <https://icdppc.org/wp-content/uploads/2015/02/Resolution-on-Cooperation-with-UN-Special-Rapporteur-on-the-Right-to-Privacy.pdf>

III. Privacy at the beginning of the year 2016

A. Definition and understanding

20. While the concept of privacy is known in all human societies and cultures at all stages of development and throughout all of the known history of humankind it has to be pointed out that there is no binding and universally accepted definition of privacy.⁵ To understand the right better it is necessary to think of it from two perspectives. First, it should be considered what the positive core of the right encompasses. Secondly, the question arises how to delimit the right in the form of a negative definition. It would appear that we are some distance from having completed these two tasks.

21. As reaffirmed by the Human Rights Council in resolution 28/16 article 12 of the Universal Declaration of Human Rights (UDHR) and article 17 of the International Covenant on Civil and Political Rights (ICCPR) constitute the basis of the right to privacy in international human rights law. Taken together with a number of other international and national legal instruments including constitutions and ad hoc legislation, this means that there exists world-wide, a considerable legal framework which can be useful to the protection and promotion of privacy. The existence and usefulness of this legal framework is however seriously handicapped by the lack of a universally agreed and accepted definition of privacy. In some cases it may prove to be next to useless if we were to have 193 nations signed up to the principle of protecting privacy if we do not have a clear understanding of what we have agreed to protect.

22. The absence of a universally agreed and accepted definition of privacy is not the only major handicap faced by the Special Rapporteur on Privacy (SRP). Even had the drafters of all the existing legal instruments, UN and otherwise, included a universally agreed definition of privacy in those instruments we would still have had to deal with what can be conveniently summed up as the Time, Place, Economy and Technology (TPET) dimensions. For the passage of time and the impact of technology, taken together with the different rate of economic development and technology deployment in different geographical locations means that legal principles established fifty years ago (ICCPR) or even thirty-five years ago (e.g. the European Convention on Data Protection) let alone seventy years ago (UDHR) may need to be re-visited, further developed and possibly supplemented and complemented to make them more relevant and useful to the realities of 2016.

23. Against a background of a lack of a universally agreed definition and TPET, it is clear that for the foundations of "the privacy house" to be strong and fit-for-purpose we first require to establish a re-freshened understanding of what privacy means to different people in different places in different circumstances across the planet. This therefore would *prima facie* seem to be not only a fundamentally important task but also a priority task for the SRP.

24. A debate on privacy in some cultures includes the debate on abortion. Without entering into the merits of whether this is correct or otherwise, for the avoidance of doubt, it is being stated that, at this preliminary stage, the focus of the SRP shall be on informational privacy i.e. on the function and role of privacy in determining the flows of information in society and the resultant impact on the development of the personality of individual citizens

⁵ For a much more detailed insight into the SRP's assessment of the existence and time, place and space dimensions of privacy across the millennia see Joseph A Cannataci (ed) *The Individual and Privacy* Publisher: Ashgate; Extent: 552 pages; ISBN-10: 1409447170 ISBN-13: 9781409447177 Sku: 246532549; Publish Date: 19/03/2015 - <http://www.ashgate.com/isbn/9781409447177>

as well as almost inextricably related issues such as the distribution of power and wealth within society, and this to the exclusion of subjects such as abortion. When doing so however it becomes clear that it is not only privacy that impacts the flows of information in society but also other rights like freedom of expression and freedom of access to publicly-held information. All of these rights are important and commitment to one right should not detract from the importance and protection of another right. Taking rights in conjunction wherever possible is healthier than taking rights in opposition to each other. Thus, properly speaking, it is not helpful to talk of “privacy vs. security” but rather of “privacy and security” since both privacy and security are desiderata ... and both can be taken to be enabling rights rather than ends in themselves. Security is an enabling right for the over-arching right to life while privacy may also be viewed as an enabling right in the overall complex web of information flows in society which are fundamentally important to the value of autonomy and the ability of the individual to identify and choose between options in an informed manner as he or she develops is or her own personality throughout life.

25. When launching the debate on the understanding of what privacy is and should be in 2016, the SRP wishes to focus on fundamentals and to avoid the debate being side-tracked by what may be perceived or real local or cultural differences at the fringes of privacy as opposed to the strong core of privacy-values which may eventually be found to enjoy universal consensus. In order to help focus a fresh, structured debate on fundamentals the SRP intends to provocatively posit privacy as being an enabling right as opposed to being an end in itself. Several countries around the world have identified an over-arching fundamental right to dignity and the free, unhindered development of one’s personality. Countries as geographically far apart as Brazil and Germany have this right written into their constitution and it is the SRP’s contention that a) such a right to dignity and the free, unhindered development of one’s personality should be considered to be universally applicable and b) that already-recognised rights such as privacy, freedom of expression and freedom of access to information constitute a tripod of enabling rights which are best considered in the context of their usefulness in enabling a human being to develop his or her personality in the freest of manners. Positing privacy and better still, the question “Why Privacy?” in the context of a wider debate about the fundamental right to dignity and the free, unhindered development of one’s personality reflects the realities of life in the digital age and should help all participants in the debate, irrespective of which country or culture they may hail from, to focus on the fundamentals of the development of one’s personality and what kind of a life they would like privacy to help protect rather than lose too much time on what privacy-relevant traditions in any given culture they would need to focus upon or defend/promote.

26. It will be seen that, in many cases, the debate on privacy cannot be usefully divorced from that on the value of autonomy or self-determination. The latter term is one which has been discussed often within UN and other circles and, when related to privacy and personality rights, in some countries such as Germany where it has, since 1983, given additionally rise to a constitutional right to “informational self-determination”. The appeal and validity of this concept needs to be evaluated further in the context of a global discussion on how the right to privacy should be better understood in 2016, possibly in the context of a discussion of the protection and promotion of the fundamental right to dignity and the free, unhindered development of one’s personality.

27. The tripod of enabling rights mentioned above – privacy, freedom of expression and freedom of access to information – existed before the advent of digital technologies. As did the right to dignity and the free, unhindered development of one’s personality. Digital technology has however resulted in a huge impact on these rights since both off-line (eg through credit cards, RFID and other electronic devices) and on-line where, today, netizens generate tens of thousands of more data-sets about themselves than they did two decades ago before they started going on-line in droves. Mobile devices and converging

technologies such as mobile smart phones - where telephony, the Internet and photography converge - create a new way of life, new comforts and new expectations both in terms of convenience as well as for privacy.

28. The impact of new technologies also means that we may have to re-visit the distinctions between individual and collective privacy as well as expectations of privacy in both public and private spaces, always in the context of dignity and the free, unhindered development of one's personality.

B. Initial observations in 2015-2016

29. Choosing which were the most important events in the Privacy calendar for 2015-2016 is a difficult task and the resources were not available to the SRP to carry this out rigorously and scientifically during the first six months of the mandate. Moreover the SRP does not wish to substitute the important role played by civil society actors such as Privacy International and its affiliates which for the best part of twenty years have organised their Big Brother Awards⁶ which shine a light on privacy deeds and misdeeds. These succeed in delivering in considerable more detail and at a national level much more than can be done in this brief report to the HRC. On the other hand, the SRP would like to commend good practices, good laws, good court decisions indeed any good ideas which may promote and increase the protection of privacy so, without the pretension of the following being in any way an exhaustive list, and in no particular order, the following important developments are being brought to the attention of the HRC:

Wise restraint – a no to back doors from the Netherlands and the USA

30. Jointly to the governments of the United States of America and the Kingdom of the Netherlands which should be complimented on the restraint demonstrated in their unwillingness to permit the law to be used to engineer back-doors in communications. On the 4th January 2016, it was announced that the Dutch government has formally opposed the introduction of backdoors in encryption products. A government position paper⁷, published by the Ministry of Security and Justice and signed by the security and business ministers, concludes that "the government believes that it is currently not appropriate to adopt restrictive legal measures against the development, availability and use of encryption within the Netherlands." The conclusion comes at the end of a five-page run-through of the arguments for greater encryption and the counter-arguments for allowing the authorities access to the information. "By introducing a technical input into an encryption product that would give the authorities access would also make encrypted files vulnerable to criminals, terrorists and foreign intelligence services," the paper noted. "This could have undesirable consequences for the security of information communicated and stored, and the integrity of ICT systems, which are increasingly of importance for the functioning of the society."⁸

31. The Dutch position seems to be more clear cut than the similar US position which preceded it by some three months when, in early October 2015 FBI Director James Comey Jr. said in testimony on Capitol Hill that the administration is not pressing legislation, for now, that would force companies to decrypt customer data. "After months of deliberation, the Obama administration has made a long-awaited decision on the thorny issue of how to deal with encrypted communications: It will not — for now — call for legislation requiring companies to decode messages for law enforcement"⁹. What is of greater concern and

⁶ <http://www.bigbrotherawards.org/>

⁷ http://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2016Z00009&did=2016D00015

⁸ http://www.theregister.co.uk/2016/01/04/dutch_government_says_no_to_backdoors/

which came to the fore in the recent Apple vs FBI Case, is the position that the US administration "will continue trying to persuade companies that have moved to encrypt their customers' data to create a way for the government to still peer into people's data when needed for criminal or terrorism investigations."⁹ The SRP's position on the Apple vs FBI case has been largely though independently articulated in the High Commissioner's statement of 4 March 2016¹⁰. It is encouraging to note the latest comments made by US Defense Secretary Ash Carter when he declared "that strong encryption is essential to the nation's security... Defense Secretary Ash Carter told a tech industry audience on Wednesday 2 March 2016 that he's "not a believer in back doors," or encryption programs that leave openings for outsiders to read coded files."¹¹ This is consistent with his statements in October 2015¹² and is a position which should be encouraged and reinforced.

The beginning of the judicial end for mass surveillance – the substantive issue

32. On 06 October 2015, the Court of Justice of the European Union delivered a judgment in the case of Maximillian Schrems versus the Data Protection Commissioner of the Republic of Ireland. The Court declared void a decision by the European Commission which established the so-called "Safe Harbour" framework and which was based on Directive 95/46/EC. The SRP directs attention to what is probably one of the most important parts of that decision from a precedent-confirming (and setting) point of view:

"94. In particular, legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter"

33. Some debate will doubtless ensue over the precise meaning of "access on a generalised basis" and here the court is clearly referring to content of communications as opposed to metadata but it will be interesting to see which European law legitimising mass surveillance, if any would pass the test of such a standard if the ECJ would be inclined to continue to apply it strictly in future. The ambiguity however is at least partially dispelled when the *Schrems* decision is read together with the *Zakharov* judgement indicated below which forms as much a part of EU law as it does for other Council of Europe member states.

The importance of having a remedy – enforcement and procedural issues

34. Again, with reference to the Schrems case just quoted above, the SRP welcomes that the ECJ has become a forum for people like the applicant. Max Schrems started the case as an individual concerned about the consequences of the development of modern information technology for his dignity as a human being in a democratic society. The opportunity for individuals to argue their case and to defend their rights before a supra-national public institution, challenging existing power relations, is essential for creating knowledge to enhance the welfare of our society, and consistent with the development of international human rights law. The existence of such mechanisms is absolutely crucial to protect human rights and to restore trust in the use of technology by States or other actors.

⁹ https://www.washingtonpost.com/world/national-security/obama-administration-opts-not-to-force-firms-to-decrypt-data-for-now/2015/10/08/1d6a6012-6dca-11e5-aa5b-f78a98956699_story.html

¹⁰ ditto

¹¹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17138&LangID=E>

¹² <http://gadgets.ndtv.com/mobiles/news/us-defense-secretary-says-favours-strong-encryption-not-back-doors-809437>

¹³ <http://europe.newsweek.com/us-defense-secretary-ashton-carter-doesnt-believe-encryption-backdoors-432811?rm=eu>

35. It is also the harbinger of a new development in society, one pointing out that if you have a right this needs to be respected and enforced anywhere not just the place where servers are based.

36. The judgment of the ECJ also demonstrates the added-value of regional policy approaches which may possibly serve in future to promote bottom-up, participatory legal instruments with a wider, global reach.

Mere existence of a secret surveillance measure is a violation of the right to private life

37. The Grand Chamber of the European Court of Human Rights - in its decision *Roman Zakharov v Russia* [2015] Eur Court HR (No 47143/06) (4 December 2015)¹⁴ - has unanimously held that the Russian system of secret interception of mobile telephone communications was a violation of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedom. In addition, and very interestingly, the Court accepted that if certain conditions are satisfied an applicant can claim to be the victim of a violation of article 8 due to the mere existence of a secret surveillance measure. Perhaps most importantly was the declaration by the court that basically outlawed mass surveillance systems in a way which is even more explicit than that of the ECJ in *Schrems*.

“270. The Court considers that the manner in which the system of secret surveillance operates in Russia gives the security services and the police technical means to circumvent the authorisation procedure and to intercept any communications without obtaining prior judicial authorisation. Although the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system (see *Klass and Others*, cited above, § 59), the Court considers that a system, such as the Russian one, which enables the secret services and the police to intercept directly the communications of each and every citizen without requiring them to show an interception authorisation to the communications service provider, or to anyone else, is particularly prone to abuse. The need for safeguards against arbitrariness and abuse appears therefore to be particularly great.”

38. This decision sets up a very important benchmark highlighting as it does the requirements for reasonable suspicion and prior judicial authorisation as well as the unacceptable nature of “a system...which enables the secret service and the police to intercept directly the communications of each and every citizen without requiring them to show an interception authorisation”. This then would be the test against which all existing and new proposed legislation about surveillance in any European country must be measured. The SRP also notes with grave concern various reports about a decision of the Russian Duma (Parliament) which would enable decisions of the European Court of Human Rights to be overruled¹⁵. If these reports are true, this may, in practice, remove a very important remedy available to citizens of countries which have ratified the European Convention on Human Rights including remedies in the case of violation of the right to private life. The SRP invites the Government of the Russian Federation to assist the SRP in further verifying these reports, examining the law in question more deeply for nuance and, if the reports are fundamentally accurate, persuade the Duma to revoke the law of 4 December 2015 and thus restore the efficacy of the remedies available to Russian citizens in terms of the European Convention on Human Rights including their remedies against the state in cases where their right to privacy is infringed.

The UK's Investigatory Powers Bill

¹⁴ [http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-159324%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-159324%22]})

¹⁵ Russia has adopted a law allowing it to overrule judgements from the European Court of Human Rights (ECHR). <http://www.bbc.com/news/world-europe-35007059>

39. Recognition is due to the three joint UK Parliamentary committees: the science and technology committee on February 1, the intelligence and security committee on February 9 and most importantly, the joint committee for the bill itself on February 11, 2016 for their consistent, strong, if occasionally over-polite, criticism of the UK Government's Investigatory Powers Bill. The joint committee for the draft investigatory powers bill made 86 recommendations for changes to the bill in its report, concentrating on issues of clarity, judicial oversight and justification of the various powers. Recognition is also due to the UK Government which has taken heed of advice from various quarters and which is using the IPB to introduce much-needed reinforcement of oversight mechanisms. While there may still be some room for improvement in this area too, these are steps in the right direction. At the time of the submission of this SRP report to the HRC, the SRP's initial assessment of the latest version of the Bill published on 1 March 2016 however leads to serious concern about the value of some of the revisions most recently introduced. At the time of writing, not only do some of the UK Government's proposals appear to run counter to the logic and findings of UN Special Rapporteur on Counter-terrorism Ben Emmerson in his 2014 report dealing *inter alia* with mass surveillance¹⁶, but they *prima facie* fail the benchmarks set by the ECJ in *Schrems* and the ECHR in *Zakharov*. The SRP firmly encourages the three committees of the UK Parliament commended above to continue, with renewed vigour and determination, to exert their influence in order that disproportionate, privacy-intrusive measures such as bulk surveillance and bulk hacking as contemplated in the Investigatory Powers Bill be outlawed rather than legitimised. It would appear that the serious and possibly unintended consequences of legitimising bulk interception and bulk hacking are not being fully appreciated by the UK Government. Bearing in mind the huge influence that UK legislation still has in over 25% of the UN's members states that still form part of the Commonwealth, as well as its proud tradition as a democracy which was one of the founders of leading regional human rights bodies such as the Council of Europe, the SRP encourages the UK Government to take this golden opportunity to set a good example and step back from taking disproportionate measures which may have negative ramifications far beyond the shores of the United Kingdom. More specifically, the SRP invites the UK Government to show greater commitment to protecting the fundamental right to privacy of its own citizens and those of others and also to desist from setting a bad example to other states by continuing to propose measures, especially bulk interception and bulk hacking, which *prima facie* fail the standards of several UK Parliamentary Committees, run counter to the most recent judgements of the European Court of Justice and the European Court of Human Rights, and undermine the spirit of the very right to privacy. Finally, the SRP invites the UK Government to work closely with the mandate, especially in the context of its thematic study on surveillance, in an effort to identify proportionate measures which enhance security without being overly privacy-intrusive.

First small steps towards cyberpeace?

40. The efforts of the USA and China in leading efforts to start defusing the situation in cyberspace deserve recognition.

41. There are possibly three main dimensions to cyberpeace all threatened by on-line espionage:

- (i) sabotage and warfare;
- (ii) intellectual property rights and economic espionage
- (iii) civil rights and surveillance.

¹⁶ <http://s3.documentcloud.org/documents/1312939/un-report-on-human-rights-and-terrorism.pdf>

42. While privacy is mostly concerned with the third dimension i.e. civil rights and surveillance, this is often also caught up in discussions about the first and second dimensions. In September 2015 it was announced that the USA and China had agreed “that neither government would support or conduct cyber-enabled theft of intellectual property” and that “both countries are committed to finding appropriate norms of state behavior in cyberspace within the international community. The countries also agreed to create a senior experts group for further cyber affairs discussion”¹⁷ Not only did the US and China follow up this important step forward with cyber talks in December 2015 but they seem to have set an example for other countries too: “the U.S. announcement was followed by a similar agreement between the UK and China, and a report that Berlin would sign a “no cyber theft” deal with Beijing in 2016. In November 2015, China, Brazil, Russia, the United States, and other members of the G20 accepted the norm against conducting or supporting the cyber-enabled theft of intellectual property.”¹⁸ This is still some way off from achieving complete agreements about cyber-war or on-line surveillance and the impact of espionage on privacy of citizens but at least it is a start and the SRP cannot but try to persuade all parties concerned that the discussions should extend to include concrete measures for respect of on-line privacy too.

IV. Activities of the Special Rapporteur

Highlight Activities carried out by the Special Rapporteur

Resourcing the SRP mandate

43. Since the mandate is a new one, since the formal budget for the mandate was not approved until January 2016 and since the mandate commenced on 01 August 2015 i.e. when most of Europe – and certainly many members of the UN OHCHR secretariat in Geneva – were on holiday, it took several weeks for the Mandate to be provided any form of support by UN OHCHR staff and to date such administrative support is provided on a stopgap basis pending recruitment of staff which process is expected to be completed by June 2016. On assessing the resourcing situation SRP took immediate steps to source extra-mural funding outside UN sources. A post-doc researcher (with a PhD in privacy and the right to be forgotten) was recruited with effect from October 2015 on a part time and, with effect from January 2016 on a full-time basis in order to secure some assistance with the substantive part of the work required by the mandate. This non-UN funded full-time resource will be maintained in post until the human resource situation for the mandate stabilises. Volunteer assistance has also been very kindly provided by domain specialists and other staff from the SRP’s home institutions i.e. the Department of Information Policy & Governance within the Faculty of Media & Knowledge Sciences of the University of Malta and the STeP (Security, Technology & e-Privacy) Research Group at the Faculty of Law in the University of Groningen in the Netherlands. This assistance which, together with that of the UN staff in Geneva, is very gratefully acknowledged, enables the mandate to live on until capacity is suitably increased and a more sustainable support structure which is fit-for-purpose can come into being.

A road-map for the SRP mandate - Formulating the ten-point plan

44. Over and above the daily activities outlined in Section II – Working Methods of the SRP mandate, considerable time was invested in developing the ten-point plan outlined in Section V below and in consultation with many stakeholders about the plan.

¹⁷ <http://www.cnn.com/2015/09/25/us-china-agree-to-not-conduct-cybertheft-of-intellectual-property-white-house.html>

¹⁸ <http://blogs.cfr.org/cyber/2016/01/04/top-5-us-china-cyber-agreement/>

Engagement in multiple events

45. The SRP accepted invitations for meetings, conferences, panels and 1:1 consultations especially those which helped maintain an on-going policy of engagement about the seven thematic studies outlined in Para 4.2 above. These included (non-exhaustive list follows):

(a) Panel discussion *Inextricably intertwined: freedom of expression and privacy in Internet Governance* MAPPING Annual Stakeholders Assembly, Hannover Germany – 22 Sep 2015

(b) Meeting with Director of Global Affairs, Human Rights Watch, 30 Sep 2015 Participation in and presentation to seminar on *Data protection and privacy in statistics*, UN, Geneva, 13-14 October 2015;

(c) Meeting with the Deputy Secretary General of the International Telecommunications Union (ITU), Geneva, 14 October 2015;

(d) Organised and led Panel on *Privacy and Surveillance* at conference for intelligence services *Intelligence in the Knowledge Society 2015*, Bucharest, Romania – 16 October 2015

(e) Keynote Speech – *Privacy in the Digital Age* - International Conference of Data Protection & Privacy Commissioners, Closed session, Amsterdam 27 October 2015

(f) Participated in Round Table discussion *Tour du Monde*¹⁹ International Conference of Data Protection & Privacy Commissioners, Open session, Amsterdam 29 October 2015

(g) Participated in multiple sessions, public and bilateral, at the Internet Governance Forum, Joao Pessoa, Brazil 09-13 November 2015²⁰

(h) Delivered keynote speech, during closed workshop Big Data in the Global South International Workshop, ITS, Rio De Janeiro, Brazil 16-17 November 2015,²¹

(i) Held meetings with Ministry of Justice officials, in an in-depth analysis of new Brazilian draft law on privacy, Brasilia, 18 November 2015

(j) Held joint meeting with officials from Ministry of Telecommunications, Ministry of Justice, Ministry of the Interior, etc. regarding new Brazilian draft law on privacy, Brasilia, 18 November 2015

(k) Held meeting with Procurator General responsible at Procurator General's office, Brasilia, 18 November 2015

(l) Held meeting with Director of Human Rights, Ministry of Foreign Affairs, Brasilia, 19 November 2015

(m) Delivered (video address) speech at Consumer International Conference, 19 November 2015, Brasilia, Brazil²²

(n) Held in-depth meetings and consultations with founder director of Patient Privacy Rights, Malta 25 November 2015

(o) Delivered setting the scene panel contribution at High Level Conference "Protecting on-line privacy by enhancing IT Security and EU IT autonomy" jointly

¹⁹ <https://www.privacyconference2015.org/wp-content/uploads/2015/01/Tour-Du-Monde-Report.pdf>

²⁰ <https://www.intgovforum.org/cms/igf-2015-schedule>

²¹ <http://itsrio.org/en/2015/11/05/encontro-fechado-workshop-internacional-big-data-no-sul-global/>

²² <http://congressprogrammconsumersinternational.org/speakers.h>

organised by LIBE Committee of the European Parliament - European Parliament, Brussels
8th December 2015²³

- (p) Delivered keynote speech Conference: "Sicurezza e privacy verso un Safe Harbour 2.0"
- (q) 9th Rome, December 2015²⁴
- (r) Delivered keynote speech, on *Privacy, Identity, Security & freedom*, IPLab Conference Utrecht, 10th December 2015²⁵
- (s) Participated in induction session for Special Rapporteurs, Palais des Nations, Geneva 14-16 December 2015
- (t) *Meeting with UK*, Geneva 17 December 2015
- (u) *Meeting with China*, Geneva 17 December 2015
- (v) *Meeting with Russia*, 17 December 2015
- (w) Participated in *Technical meeting of the Counter-Terrorism Committee Executive Directorate*, on "Preventing Terrorists from Exploiting the Internet and Social Media to Recruit Terrorists and Incite Terrorist Acts, While Respecting Human Rights and Fundamental Freedoms"
- (x) Presentation via Video Conference on "The threat and challenges relating to the use of the Internet and social media for terrorist purposes, 17 December 2015
- (y) Made presentation to and led discussion with *NGO roundtable: Privacy International, Amnesty International, Reporters without Borders, Internet Society, HRW, ACLU*, Geneva, 18 December 2015
- (z) Meeting with ITU's Deputy Director of the Telecommunication Standardization Bureau, (joined by ITU Legal Unit) 18 December 2015
- (aa) Intervened through video conferencing and gave presentation "Privacy, quality of life & smart cities: Scaling-up "surveillable" to ITU conference on Smart Cities, Singapore, 18 January 2016
- (bb) In-depth meetings with Helen Wallace and Andrew Jackson of GeneWatch UK, Malta, 03 February 2016
- (cc) Delivered keynote speech (via live video conference) at Fifth workshop on data protection as part of good governance in international organisations, Geneva, 05 February 2016²⁶
- (dd) Delivered keynote speech and participated in general meeting for stakeholders, Dutch Ministry of Foreign Affairs, The Hague, The Netherlands, 03 March 2016.

V. A Ten Point action plan

46. In order to facilitate the process of further elaboration on the dimensions of the right to privacy and its relationship with other human rights the Special Rapporteur has developed an outline Ten Point Action plan. It should be kept in mind that the points

²³ <http://www.europarl.europa.eu/stoa/cms/cache/offonce/home/events/workshops/privacy>

²⁴ <http://www.dimt.it/tag/cannataci/>

²⁵ <https://www.pilab.nl/index.php/2015/12/14/the-privacy-identity-lab-four-years-later-published/>

²⁶ <https://www.icrc.org/en/event/5th-workshop-data-protection-within-international-organisations>

mentioned in the plan are brought forward in no particular order and do not imply a specifically prioritised working programme. The Special Rapporteur understands his function similarly to that of a pathfinder. In other words the aim is to seek a way forward while at the same time identifying urgent issues to be tackled or reacting to the needs of individuals or of countries who require urgent work in the sector of responsibility. The Ten Point Action Plan below is a TO DO LIST and not a mere wish-list. The SRP has embarked on each of the ten points below but naturally at the speed dictated by time-availability and resource constraints

(a) *Going beyond the existing legal framework to a deeper understanding of what it is that we have pledged to protect:* There is a need to work on developing a better, more detailed and more universal understanding of what is meant by “the right to privacy”. What does it mean and what should it mean in the 21st century? How can it be better protected in the digital age? Activities will be organised and research will be supported to examine possible answers to these key questions which will help provide essential foundations for other parts of the SRP’s action plan.

(b) *Increasing awareness:* Another important issue is the development of greater awareness amongst citizens in order to help them understand what privacy is. It is important to have a general discourse on what their privacy rights are, how their privacy may be infringed upon especially by new technologies and by their behaviour in cyberspace. They need to learn on how their personal data has been monetised and what are the existing safeguards and remedies. What can they do to minimize privacy risk and how can they interact with their law-makers and the corporate sector to improve privacy protection? This creation of awareness is a massive task in its own right, and the Special Rapporteur will contribute to this awareness-raising throughout on-going engagement with all stakeholders and especially civil society for the entire duration of his mandate.

(c) *The creation of a structured, on-going dialogue about privacy.* The establishment of a more structured, more open, more comprehensive, more effective and most importantly permanent dialogue between the different stakeholders is crucial. In order to achieve the protection of privacy bridges are required and need to be built. The Special Rapporteur would like to put great emphasis on this activity and will use existing fora as well as creating new fora. To be included are particularly the facilitating of a structured dialogue between Non-Governmental Organizations, Data Protection and Privacy Commissioners, Law Enforcement Agencies (LEAs) and Security and Intelligence Services (SIS). It is essential to work with all classes of stakeholders in order to improve internal procedures, increase the level of privacy by design in the technologies they deploy and the procedures they follow. It is important to maximise transparency and accountability and reinforce impartial and effective oversight to the point where it becomes significantly more effective and credible. Without genuinely engaging with key stakeholders including those whose role may be completely necessary and legitimate in a modern society, progress cannot be achieved.

(d) *A comprehensive approach to legal, procedural and operational safeguards and remedies:* Appropriate safeguards and effective remedies have been part of the “raison d’être” of data protection law since its inception aimed at providing guidance and protection at the correct level of detail required in a world rendered more complex by constant technological change. Clearer and more effective protection for citizens should be provided in order to prevent the infringement of privacy. Real remedies need to be available to all concerned in those cases where an infringement actually occurs. The search for safeguards and remedies is transversal and underlies all of the SRP’s thematic studies identified in Section II paras 6 to 15.

(e) *A renewed emphasis on technical safeguards:* The safeguards and remedies available to citizens cannot ever be purely legal or operational. Law alone is not enough. The SRP will continue to engage with the technical community in an effort to promote the development of effective technical safeguards including encryption, overlay software and various other technical solutions where privacy-by-design is genuinely put into practice.

(f) *A specially-focused dialogue with the corporate world.* An increasing number of corporations today already gather much more personal data than most governments ever can or will. What are the acceptable alternatives to or the key modifications that society should expect from current business models where personal data has been heavily monetised? Which are the safeguards applicable in cases where data held by private corporations are requested by state authorities? This dimension of the mandate requires much time and attention. The SRP has already commenced direct contacts with industry and will maintain a privacy-focused dialogue relevant to these issues with a range of industry players with the intention of informing new developments in the corporate sector as well as other parts of the SRP's mandate.

(g) *Promoting national and regional developments in privacy-protection mechanisms* The value of national and regional developments in privacy-protection mechanisms should be appreciated more at the global level. The SRP has an important complementary role to play when working in close co-operation with Data Protection and Privacy Commissioners world-wide. Through mutual cooperation and dialogue the global standards of privacy protection could be raised significantly. The SRP has commenced a series of global activities planned and executed with Data Protection Authorities world-wide. These include events planned for Australia, Morocco, New Zealand, Northern Ireland and Tunisia for 2016 with many others in the pipeline for future years.

(h) *Harnessing the energy and influence of civil society.* Having already met with representatives of over forty (40) NGOs during his first six months in office, the SRP intends to continue dedicating considerable time to listening to and working with those representatives of civil society who are putting in so much effort to better protect privacy world-wide.

(i) *Cyberspace, Cyber-privacy, Cyber-espionage, Cyberwar and Cyberpeace* The global community needs to be inquisitive, frank and open about what is really going on in cyberspace, including the realities of mass surveillance, cyber-espionage and cyberwar. Tackling these realities will build upon the results of other action points outlined above as well as the results of the thematic studies indicate in Section II paras 6 to 15. The Special Rapporteur expects these issues to be a constant feature of a number of his reports as well as in many of the country visits and, by transparently engaging with stakeholders about these issues, hopes to play a constructive role in improving the protection of privacy in the digital age.

(j) *Investing further in International Law.* While law alone is not enough it is very important. The potential for development of international law relevant to privacy should be explored in all forms and the SRP is open to examining the value of any legal instrument irrespective of whether this is classed as soft law or hard law. A priority issue such as up-dating legal instruments through an expanded understanding of what is meant by the right to privacy would seem to be an essential starting point. There appears to be a consensus amongst several stakeholders that one of these legal instruments could take the form of an additional protocol to Art. 17 of the ICCPR²⁷ wherein the SRP is being urged "to promote the opening of negotiations on this additional protocol during his first mandate"²⁸. The precise timing of this however should probably be contingent on the duration and outcome of in-depth and wide-ranging discussions invoked through action point a) above – i.e. achieving a better universal understanding of what the core values in privacy are or may be. Some other privacy-relevant matters, especially issues of jurisdiction and territoriality in cyberspace cannot be addressed satisfactorily unless there is a clear international agreement to that effect, one which would normally take the form of agreement in a multilateral treaty most probably on a specific topic or set of issues. For the avoidance of doubt it should be stated that what is envisaged is not one new global all-encompassing international convention covering all of privacy or Internet governance. It is far more realistic to expect that protection of privacy can be increased through incremental growth of international law and thus the clarification and eventually the extension of existing legal instruments as well as even, in the mid to long term, the development of

²⁷ <https://icdppc.org/wp-content/uploads/2015/02/Resolution-on-Cooperation-with-UN-Special-Rapporteur-on-the-Right-to-Privacy.pdf>

²⁸ Ibid.

entirely new legal instruments. On-going discussions about international law and new legal instruments in the field of internet governance will also be monitored by the SRP in order to determine the timing of initiation of action within UN bodies as well as the type and scope of the legal instrument that the SRP may possibly eventually wish to recommend to the HRC and the GA.

VI. Conclusions

47. The SRP has been impressed by the overwhelmingly warm and enthusiastic welcome that he has received from most sectors of society, most classes of stakeholders;

48. Privacy has never been more at the forefront of political, judicial and personal consciousness than in 2016;

49. The tensions between security, corporate business models and privacy continue to take centre stage but the last twelve months have been marked by contradictory indicators: some governments have continued, in practice and/or in their parliaments to take privacy-hostile attitudes while courts world-wide but especially in the USA and Europe have struck clear blows in favour of privacy and especially against disproportionate, privacy-intrusive measures such as mass surveillance or breaking of encryption.

50. There are strong indicators that Privacy has become an important commercial consideration with some major vendors adopting it as a selling point. If there is a market for privacy, market forces will provide for that market. The rapid increase in the availability of encrypted devices and software services is a strong indicator that consumers world-wide are increasingly aware of risks to their privacy and the fact that they will increasingly choose privacy-friendly products and services over ones which are privacy-neutral or privacy-unfriendly;

51. While some governments continue with ill-conceived, ill-advised, ill-judged, ill-timed and occasionally ill-mannered attempts to legitimise or otherwise hang on to disproportionate, unjustifiable privacy-intrusive measures such as bulk collection, bulk hacking, warrantless interception etc. other governments led, in this case by the Netherlands and the USA have moved more openly towards a policy of no back doors to encryption. The SRP would encourage many more governments to coalesce around this position.

52. Countries world-wide are not only waking up to their responsibilities and to the realities of technical safeguards such as encryption. They are also slowly but surely realising the limitations of gains and the enormity of risks should they bring ruin to cyberspace through cyberwar and cyberespionage. We are still some way away from sufficient progress in this area but 2015 has seen some important beginnings so the SRP encourages Governments – and not just from the G20 – to come to the table to discuss appropriate state behaviour and related governance measures for cyberspace, ones which inter alia address civil rights especially privacy, freedom of expression and surveillance.

53. The working methods of the SRP and the ten-point plan should be indicative of a holistic approach to the subject of privacy protection and promotion in the digital age. A holistic approach helps determine the overall picture of what needs to be done but the timing of precisely what needs to be done by whom and when will depend on two main factors: i) the resources available to pursue the action plan and to complete the thematic studies and ii) the willingness of various stakeholders to accept and promote a privacy-friendly agenda as opposed to clinging on to a “command and control mentality”. To those who at first glance may find the Action Plan to be not

only ambitious but possibly over-ambitious, the SRP's message is clear and simple: if you agree with the objectives of the plan and with its integration of a number of complex but inter-related issues then come forward and contribute additional resources for the implementation of part or all of the plan. This would help achieve the transition from over-ambitious to ambitious. The SRP is building on his experience as an experienced project manager with a successful track record in raising tens of millions of Euro/dollars for privacy-related research to work on a strategy to increase the resources available to the mandate and the ten-point plan is posited on the success of that strategy. Even if this strategy is completely successful, the SRP fully expects that continuation and completion (if ever) of parts of the Ten Point Action Plan would fall upon the next mandate holder. The challenge at this stage is to provide a clear comprehensive vision and strong foundations which can form the basis of solid, evidence-based policy making in the field of privacy protection.

Annexes

Annex I. Some challenges faced by the SRP & a vision of the mandate

1. The fact that the mandate on privacy is a new one presents both advantages and disadvantages. Amongst other things it means that the Special Rapporteur on Privacy (SRP) had no roadmap to follow and indeed one of his first priorities in this case is to work on designing and developing such a roadmap. This means that some of the issues identified in this and later reports are not necessarily capable of being resolved within the time-constraints imposed by one or even two three-year mandates. They are mentioned however in order to provide a more holistic picture of what needs to be done in the short, mid and long-term. In doing so, this incumbent is conscious of possibly identifying issues which may possibly be more appropriately tackled in a more timely manner by later holders of the mandate.

2. One of the recurring themes of this and later reports will undoubtedly be the time dimension. The rapid pace of technology and its effects on privacy means that action on some already-identified issues may increase or decrease in priority as time goes by while new issues may emerge fairly suddenly. It may also mean that sometimes it may be more opportune to launch or intensify action on a particular issue not necessarily because it is much more important than other issues but rather because the timing is right, because the different international audiences and classes of stakeholders may be far more sensitive and receptive to that particular issue for reasons and circumstances over which the Special Rapporteur may have absolutely no control but in which case it would be foolish not to take advantage of favourable opportunities which may result in the creation or improvement of privacy safeguards and remedies.

3. The later prioritisation of action will also depend on the extent of the resources made available to the Special Rapporteur and the extent to which he can succeed in attracting fresh resources to support the mandate on privacy. This resource issue is fundamentally important and will directly affect the extent of the impact the mandate on Privacy may have in practice in real life. It is clear that, however good in quality in some respects, the quantity of resources provided to the mandate by the UN is woefully inadequate and even if the mandate's human and financial resources are increased ten-fold, it would still be hard-pressed to achieve the minimum required to persuade the incumbent that the work of the mandate is really making a difference to the protection of privacy of ordinary citizens around the world. The experience of the first six months in office has persuaded the mandate-holder that not only must the SRP be omni-present 24/7 on the many privacy-related issues which arise literally every day in many countries around the world but that he must also act as rainmaker, somehow attracting funds and human resources in order to make the work of the mandate both possible and sustainable in the short, mid and long-term. The effort required by what is, in essence, a part-time, un-paid position which must, by definition, co-exist with a demanding day-job, should not be under-estimated. This effort can be encouraged by the positive response of all stakeholders not least that of the nation-states, members of the UN to whom this report is addressed. If these stakeholders do not support the mandate adequately, if they do not put their money where their mouth is, then this will only serve to increase the frustrations already inherent to any work being carried out within the UN's systems and bureaucracy.

4. The incumbent's vision of the mandate is therefore analogous to the process required to design, finance, project manage and complete the building of a house or other building suitable for human beings to live and/or work in safely. Firstly we need to

understand the function of the building: is it a residence for an individual living alone or for one nuclear family, or for a large and extended family or indeed for several of such individuals and families? Should it include a working space and if so for what type of work: is this to be a farm-house, a baker's *casa bottega* or a black-smith's lodge or an urban block of multi-rise apartments? Form follows function so the function or functions must be clearly identified and understood in-depth. Secondly, form follows function so the design of the house – or the mandate's range of activities – must be completed on the basis of the function. Thirdly, the size of the building and its interior may be basic, cramped, spartan i.e. just barely enough to provide basic shelter and sanitation or else it may be more comfortable and spacious and functional or else it may be downright luxurious. Whether it is one or the other will depend on the resources and especially the finances which can be projected to be available to the builder – and these will influence the final design of the plan for the building – and the mandate. Fourthly, the time available to complete essential parts of the building will also influence the design of the plan. Fifth, it will need to be borne in mind that life gets in the way of the best-laid plans and the design may, from time to time, have to be more of an emergent design process rather than the fulfilment of a rigid, prescriptive pre-ordinate design. This analogy is useful to explaining the scope of this report especially to emphasize that while the building itself may not necessarily be capable of completion within the time-frame of one or even two three-year mandates, it is very important to decide on what the final building needs to be like, otherwise we would be unable to design the type of the foundations we require to build...and unless the foundations are sound and fit-for-purpose the building will ultimately prove to be unsustainable and collapse.

Annex II. A more in-depth look at Open Data & Big Data

1. One of the most important issues in information policy and governance in the second decade of the twenty-first century deals with determining the *medio stat virtus* between, on the one hand, use of data for the benefit of society under the principles of Open Data and, on the other hand, the established principles we have developed to date with a view to protecting fundamental rights like privacy, autonomy and the free development of one's personality.

2. At first sight Open Data sounds fine as a concept, a noble and altruistic approach to dealing with data as a common good, if not quite "common heritage of mankind". Who could object to data sets being used and re-used in order to benefit various parts of society and eventually hopefully all of humanity? It is what you can do with Open Data that is of concern, especially when you deploy the power of Big Data analytical methods on the data sets which may have been made publicly available thanks to Open Data policies. Of course, it is important to differentiate between data sets of one type and another. If what is put into the public domain consists of, say, the raw data arising out of tens of thousands of questionnaire responses about perceptions of privacy which responses would have been gleaned from across 27 EU member states and processed in an anonymised manner, the risk to individual privacy from aggregated data sets would appear to be very low if not non-existent. If, on the other hand, one uses Big Data analytical methods to develop links between supposedly anonymized medical data and publicly available electoral registers in a way that links identified or identifiable individuals to sensitive patient information then society has genuine cause for concern. Pioneers like Latanya Sweeney in the USA have demonstrated these abilities and exposed these risks on numerous occasions over the past two decades but the question remains: how should society intervene? More precisely how should policy-makers act in the face of such risks? Which is the correct information policy to develop and adopt? Especially since society has already intervened in a number of ways. Open Data is an information policy born out of specific information politics. For example, the EU legislated in favour of re-utilising public data more than 12 years ago (Directive 2003/98/EC), indeed five years after Prof Sweeney's first eye-opening discoveries.²⁹ Is this one of many cases where Open Data Policies were embraced before unintended consequences were properly understood and may now need to be remedied?

3. It is sometimes not widely appreciated how fundamental a challenge Open Data represents to the most important principles in data protection and privacy law world-wide. For the best part of forty years, our entire *forma mentis* has been founded upon something we call the purpose-specification principle. Put simply, personal data should be collected, used, stored and re-used for a specified legitimate purpose or for a compatible purpose. Once the time required for the data to be stored by that specified purpose runs out then the

²⁹ "In 2000, Sweeney analyzed data from the 1990 census and revealed that, surprisingly, 87 percent of the U.S. population could be identified by just a ZIP code, date of birth, and gender" according to Caroline Perry, SEAS Communications "You're not so anonymous" October 18, 2011 last accessed on 13 Jan 2016 at <http://news.harvard.edu/gazette/story/2011/10/you%E2%80%99re-not-so-anonymous/>. However, in testimony to the Privacy and Integrity Advisory Committee of the Department of Homeland Security ("DHS") on 15 June 2005 Sweeney states that it was in 1997 that she "was able to show how the medical record of William Weld, the governor of Massachusetts of the time could be re-identified using only his date of birth, gender and ZIP. In fact, 87% of the population of the United States is uniquely identified by date of birth (c.g., month, day and year), gender, and their 5-digit ZIP codes. The point is that data that may look anonymous is not necessarily anonymous". http://www.dhs.gov/xlibrary/assets/privacy/privacy_advcom_06-2005_testimony_sweeney.pdf last accessed on 13 January 2016

data should be deleted permanently. Re-using personal data is not part of our privacy or data protection DNA.

4. The purpose-specification principle is not something invented by Europeans. One of the first places where it is articulated as such is in a 1973 report by an Advisory Committee to the US Department of Health³⁰ where it was held that “There must be a way for an individual to prevent personal information used for one purpose from being used or made available for other purposes without his or her consent” This quickly became a fundamental value in many other fora. The OECD Guidelines of 1980 have the Purpose specification Principle as the third out of eight principles “The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose”. In this context it is also important to note the OECD’s corollary fourth principle usually recognised as the Use Limitation Principle whereby “Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with 3 above except a) with the consent of the data subject; or b) by the authority of law” These principles are also found in the Council of Europe’s influential Data Protection Convention of 1981 and the EU’s Data Protection Directive (46/95).

5. In an important regional development, the European Union is now at an advanced stage of devising and implementing the next generation of its data protection laws. When one examines the texts produced by the EU between 2012 and 2015, it is not as if the European Union appears ready to abandon the principle of purpose limitation. In the latest available version³¹ of the draft text of the EU’s General Data Protection Regulation (GDPR) the importance of the purpose specification principle does not appear to be in any way to be diminished. Article 5 b retains the principle prominently, stipulating that personal data shall be

- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;

an approach reinforced by the next principle to be found in the GDPR’s Article 5 which lays down that personal data shall be

- (c) adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data;

6. The meaning of these key principles had been similarly announced in the recitals of the GDPR

³⁰ DHEW Secretary’s Advisory Committee on Automated Personal Data Systems, *Records, Computers and the Rights of Citizens*, U S Govt, Printing Office, Washington USA 1973 at p. 41

³¹ s_2014_2019_plmrep_AUTRES_INSTITUTIONS_COMM_COM_2015_12-17_COM_COM(2012)0011_EN.pdf

- (30) Any processing of personal data should be lawful, fair and transparent in relation to the individuals concerned. In particular, the specific purposes for which the data are processed should be explicit and legitimate and determined at the time of the collection of the data. The data should be adequate, relevant and limited to the minimum necessary for the purposes for which the data are processed; this requires in particular ensuring that the data collected are not excessive and that the period for which the data are stored is limited to a strict minimum. Personal data should only be processed if the purpose of the processing could not be fulfilled by other means. Every reasonable step should be taken to ensure that personal data which are inaccurate are rectified or deleted. In order to ensure that the data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review.

7. It is clear therefore that the current thinking in Europe on Data Protection still relies on the purpose specification principle taken in tandem with anonymization or deletion despite all the risks inherent in the use of Big Data Analytics and Open Data. Likewise, in the United States where on May 9, 2013, President Obama signed an executive order³² that made open and machine-readable data the new default for government information³³, some have attempted to downplay the concerns raised by Latanya Sweeney and have generally held that the risks of de-identification are not as great as previously made out.³⁴ Yet, a detailed analysis of the output of Prof Sweeney's Data Privacy Lab³⁵ and some of her more recent research³⁶ persuade the SRP that we are running the risk of using outmoded safeguards, almost twenty years after our attention was drawn to the fact that stripping personal data of some basic identifiers may not be enough to protect privacy.

8. A careful examination of the pivotal thinking in Europe in 2015-2016 does not provide much reassurance especially if one carefully examines the pertinent part of the latest version³⁷ available of the draft EU General Data Protection Regulation which holds that

- (23) The principles of protection should apply to any information concerning an identified or identifiable person. To determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the individual. The principles of data protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.

9. This latest version from December 2015 after negotiation with the Council is less detailed than the one approved by the Parliament in October 2013 which held that

³² <https://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government>- last accessed on 13 Jan 2016

³³ <https://www.whitehouse.gov/open> last accessed on 13 January 2016

³⁴ See for example Barth-Jones, Daniel C. "The "Re-identification" of Governor William Weld's Medical Information: A Critical Re-examination of Health Data Identification Risks and Privacy Protections. Then and Now" June 2012 last accessed on 13th January at <https://fpf.org/wp-content/uploads/The-Re-identification-of-Governor-Welds-Medical-Information-Daniel-Barth-Jones.pdf>

³⁵ <http://dataprivacylab.org/index.html>

³⁶ Sweeney L, Matching Known Patients to Health Records in Washington State Data, 2012 last accessed on 13th January 2016 at <http://dataprivacylab.org/projects/wa/1089-1.pdf>

³⁷ http://www.emeeeting.europarl.europa.eu/committees/agenda/201512/LIBE/LIBE%282015%291217_1/sitt-1739884 last accessed on 13th January 2016

- (23) The principles of data protection should apply to any information concerning an identified or identifiable natural person. To determine whether a person is identifiable, account should be taken of all the means reasonably likely to be used either by the controller or by any other person to identify or single out the individual directly or indirectly. To ascertain whether means are reasonable likely to be used to identify the individual, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration both available technology at the time of the processing and technological development. The principles of data protection should therefore not apply to anonymous data, which is information that does not relate to an identified or identifiable natural person. This Regulation does therefore not concern the processing of such anonymous data, including for statistical and research purposes.

10. Is the change an improvement, a factor which strengthens privacy protection in the era of Open Data or Big Data or is it a compromise which weakens protection? Whereas, it seems to the SRP that the very standard formulation of October 2013,³⁸ dependant as it was on the costs and time required to identify an individual, is rapidly becoming archaic in the era of big data analytics, the rather vaguer 2015 version seems to be a bit more elastic, but that could be a double-edged sword. If we are to insist on maintaining information policies built around the principles of Open Data then we need to develop much stronger, complex algorithmic solutions and procedural safeguards. The application of the newest EU proposals pivot almost entirely on what constitutes anonymous data yet Latanya Sweeney³⁹ and others have clearly demonstrated that there are huge limits to anonymization and it would seem that practically most personal data may actually be identifiable with such minimal effort that they would not meet eligibility criteria to qualify as anonymous data, thus bringing the GDPR into play.

11. Things get even more complicated when taking into consideration the factors legitimising research⁴⁰

- (88) For the purposes of processing for historical, statistical and scientific research purposes, the legitimate expectations of society for an increase of knowledge should be taken into consideration.

12. While the issue of sensitive data such as health information still presents a quandary within the EU's GDPR

- (42) Derogating from the prohibition on processing sensitive categories of data should also be allowed if done by a law, and subject to suitable safeguards, so as to protect personal data and other fundamental rights, where grounds of public interest so justify and in particular for health purposes, including public health and social protection and the management of health-care services, especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system, or for historical, statistical and scientific research purposes.

13. How do Open Data and Big Data analytical capabilities fit into the scenarios and thinking portrayed above? Which would be the suitable safeguards to apply in Open Data policies which would protect privacy in the era of Big Data? Are the latest legal innovations

³⁸ "unofficial consolidated version" <https://www.janabrecht.eu/fileadmin/material/Dokumente/DPR-Regulation-unofficial-consolidated-LIBE.pdf> last accessed on 13th January 2016

³⁹ <http://latanyasweeney.org/publications.html>

⁴⁰ Though this recital 88 has been expanded in the latest 17 Dec 2015 version

being contemplated in Europe the right response to the evidence presented by Sweeney and do they represent best practice for the world to follow or dubious practice for the world to shun? The only thing that is certain is that if we are to get things right then it is clear that we need much more in-depth analysis of both the risks of Open Data as well as existing and new safeguards. Moreover, in this field too there appears to be a huge need for increasing public awareness. Relatively few people seem to know about the existence of open data policies or the consequences of applying big data analytics to different data sets put into the public domain by Open Data policies. In the course of participating in debates about Open data and Big data during tenure as SRP, one reinforced the impression that Open Data policies and their privacy and autonomy implications remain very much an area of interest to a tiny group of domain specialists and then again may be restricted further by the language in which they are made available to the public. The SRP is very sensitive to and is working with NGOs interested in protecting personal data in a number of sectors, including medical data and will, during 2016-2017 be engaging in events aimed at promoting discussion and on-going, in-depth investigation of related matters. The SRP is also very concerned that entire nations or trading blocs including major nations or regional federations such as China, the European Union and the United States have adopted or are adopting Open Data and Big Data policies the far-reaching consequences of which may not as yet be properly understood and which may unintentionally put in peril long-standing social values as well as the fundamental rights to privacy, dignity and free development of one's personality. Some studies on posthumous privacy suggest that in 2016 the citizens of some countries may be better off dead from a privacy point of view since their rights to privacy are better protected by law if they are dead than if they are alive in a world where Open data and big data analytics are a way of life endorsed by the information policies of the countries concerned. These developments may well be unintentional but the impact on privacy, autonomy, dignity and free development of personality may be far-reaching.

Annex III. Further reflections about the understanding of privacy

A. Core Values and Cultural Differences

1. As a result of the processes described in Section III of the report, an improved, more detailed understanding of privacy should be developed by the international community. This understanding should possibly result in some flexibility when it comes to addressing cultural differences at the outer fringes of the right or in privacy-neighbouring rights while clearly identifying a solid and universally valid core of what privacy means in the digital age.

2. This global concept of privacy has to pass the test of being positively describable and definable as a precious substantive right on the one hand. On the other hand there also needs to be a negative understanding of the right which hints at legitimate limitations should it be legitimate and necessary to restrict privacy in a proportionate manner. The Special Rapporteur invites all actors in the field to contribute to the development of this urgently needed and improved understanding of the right to privacy and is convinced that significant progress is possible.

B. Enforcement

3. Apart from the absence of a clear universal understanding of privacy, the lack of effective enforcement of the right is an issue which is evident at most turns of the debate. Thus, not only is it not entirely clear what needs to be protected but also how to do it. Regretfully though perhaps hitherto inevitably, the super-fast development of privacy-relevant technologies and especially the Internet has led to a huge organic growth in the way in which personal data is generated and the exponential growth in the quantity of such data. This is especially evident in an on-line environment where, when seen from a global perspective, it would appear that the triangle of actors consisting of legislators, private (mostly corporate) actors and citizens all try to shape cyberspace using their possibilities in an uncoordinated manner. This may lead to a situation where none of the three is able to unleash the full potential of modern information technology.

4. In order to disentangle this triangular relationship an ongoing and open dialogue needs to be set up which eventually would provide for a more clear and harmonious regulation of cyberspace. This can only be achieved as a result of a sincere, open and committed dialogue of all parties which is to be held in a respectful and open manner. Sturdy and reliable bridges need to be built between all actors which are shaping the developments. It is the intention of the Special Rapporteur to listen closely to all parties and to facilitate this dialogue. In this way a basis for a positive and sustainable long-term development in the field of privacy protection should be achieved.

Annex IV A “State of the Union” approach to Privacy

1. It would appear to be useful to, at least once a year, have the SRP present an independent stocktaking report on where the right to privacy stands and this may be one of the primary functions of both the reports to be made to the Human Rights Council (HRC) and the General Assembly (GA). Since these reports are constrained by a word-limit it is clear that they can be little more than an extended executive summary of the findings and activities of the mandate throughout the reporting period. It should follow that the reports will also reflect the working methods of the mandate as outlined in Section II of the main report, in particular the thematic investigations as well as salient developments identified in the country monitoring activities carried out by the SRP team. It is expected that the report presented to the March 2017 session of the Human Rights Council would be the first such report reflecting a “State of the Union” approach. The report to the March 2016 session of the HRC will not attempt to prioritise risks or landmark improvements in privacy protection but simply refer to a few cases which illustrate particular progress or difficulties.
